provisions of the order shall not be deemed to include a bona fide and independent collection agency or attorney.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Issued: June 11, 1964.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 64-6582; Filed, July 1, 1964; 8:45 a.m.]

[Docket C-753]

PART 13—PROHIBITED TRADE PRACTICES

Grolier Enterprises, Inc.

Subpart—Advertising falsely or misleadingly: § 13.15 *Business status, advantages, or connections:* 13.15-25 Concealed subsidiary, fictitious collection agency, etc. Subpart—Using misleading name—Vendor: § 13.2365 *Concealed subsidiary, fictitious collection agency, etc.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order, Grolier Enterprises, Inc., New York, N.Y., Docket C-753, June 11, 1964]

Consent order requiring a New York City distributor of books and other publications to cease representing falsely to purportedly delinquent customers that delinquent accounts would be transferred to an attorney for collection and through use on letterheads of the fictitious name "The Mail Order Credit Reporting Association, Inc.", that an account was in the hands of an independent agency of that name for collection, and that, if payment was not made, the customer's credit rating would suffer.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondent, Grolier Enterprises Inc., a corporation and its officers, agents, representatives and employees, successors or assigns, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, publications or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that:

1. Delinquent accounts will be turned over to an attorney to institute suit or other legal action where payment is not made, unless respondent establishes that such is the fact;

2. (a) Delinquent accounts will be turned over to a bona fide, separate collection agency for collection unless respondent establishes that a prior determination had been made in good faith to make such referral;

(b) Delinquent accounts have been turned over to a bona fide, separate collection agency for collection unless respondent establishes that such is the fact;

3. Delinquent accounts have been turned over to "The Mail Order Credit Reporting Association, Inc." for collection or any other purpose;

4. "The Mail Order Credit Reporting Association, Inc.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises any direction or control, is an independent bona fide collection or credit reporting agency;

5. A customer's name will be or has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected, unless respondent establishes that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

6. Letters, notices or other communications which have been prepared or originated by respondent have been prepared or originated by any other person, firm or corporation.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Issued: June 11, 1964.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 64-6583; Filed, July 1, 1964; 8:45 a.m.]

[Docket C-752]

PART 13—PROHIBITED TRADE PRACTICES

Pocket Books, Inc.

Subpart—Advertising falsely or misleadingly: § 13.15 *Business status, advantages, or connections:* 13.15-25 Concealed subsidiary, fictitious collection agency, etc. Subpart—Using misleading name—Vendor: § 13.2365 *Concealed subsidiary, fictitious collection agency, etc.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order, Pocket Books, Inc., New York, N.Y., Docket C-752, June 11, 1964]

Consent order requiring a New York City distributor of books and other publications, phonograph records, etc., to cease representing falsely to purportedly delinquent purchasers of its "Golden Records" and "Golden Record Library" that a delinquent customer's name was transmitted to a bona fide credit reporting agency and that if payment was not made his general credit rating would be adversely affected, and, through use on letter heads of the fictitious name "The Mail Order Credit Reporting Association, Inc.", that the delinquent account had been turned over to an independent agency of that name for collection.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondent Pocket Books, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, publications, phonograph records or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. A customer's name will be turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

2. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency unless respondent in fact turns such accounts over to such agencies;

3. Delinquent accounts have been or will be turned over to "The Mail Order Credit Reporting Association, Inc." for collection or any other purpose;

4. "The Mail Order Credit Reporting Association, Inc." any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises direction or control, is an independent, bona fide collection or credit reporting agency;

5. a. Delinquent accounts have been or will be turned over to "The Mail Order Credit Reporting Association, Inc." with instructions to institute suit or other legal action to collect amounts purportedly due;

b. Respondent intends to turn delinquent accounts over to any other organization, attorney or firm of attorneys, or person with instructions to institute suit or other legal action unless in fact at the time such representation is made, respondent intends to take such action;

c. Delinquent accounts have been turned over to any other organization, attorney, firm of attorneys or person with instructions to institute suit or other legal action unless respondent establishes that such is the fact;

6. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent have been prepared or originated by any other person, firm or agency.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Issued: June 11, 1964.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 64-6584; Filed, July 1, 1964; 8:45 a.m.]

[Docket C-755]

PART 13—PROHIBITED TRADE PRACTICES

Simon & Schuster, Inc.

Subpart—Advertising falsely or misleadingly: § 13.15 *Business status, advantages, or connections:* § 13.15–25 Concealed subsidiary, fictitious collection agency, etc. Subpart—Using misleading name—Vendor: § 13.2365 *Concealed subsidiary, fictitious collection agency, etc.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45) [Cease and desist order, Simon & Schuster, Inc., New York, N.Y., Docket C-755, June 11, 1964]

Consent order requiring a New York City distributor of books and other publications to cease representing falsely on letterheads of the fictitious "The Mail Order Credit Reporting Association, Inc.", that a bona fide collection agency of that name had delinquent accounts for collection and that, if payment was not made, the customer's credit rating would be adversely affected.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondent Simon & Schuster, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of publications or books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. "The Mail Order Credit Reporting Association, Inc.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises direction or control, is an independent, bona fide collection or credit reporting agency;

2. Delinquent accounts have been or will be turned over to "The Mail Order Credit Reporting Association, Inc." for collection or any other purpose;

3. A customer's name has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received the information of said delinquency is referred to a separate, bona fide credit reporting agency;

4. Delinquent accounts have been turned over to a bona fide, separate collection agency for collection unless respondent in fact has turned such accounts over to such agency;

5. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent have been prepared or originated by any other person, firm or corporation.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commision a report in writing setting forth in detail the manner and form in which it has complied with this order.

Issued: June 11, 1964.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 64-6585; Filed, July 1, 1964; 8:45 a.m.]

[Docket C-756]

PART 13—PROHIBITED TRADE PRACTICES

Timed Energy, Inc., et al.

Subpart—Advertising falsely or misleadingly: § 13.15 *Business status, advantages, or connections:* 13.15–25 Concealed subsidiary, fictitious collection agency, etc. Subpart—Using misleading name—Vendor: § 13.2365 *Concealed subsidiary, fictitious collection agency, etc.*

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended, 15 U.S.C. 45) [Cease and desist order, Timed Energy, Inc., et al., Long Island, N.Y., Docket C-756, June 11, 1964]

In the Matter of Timed Energy, Inc., a Corporation, and James E. True, Patricia M. Gallehr, and Leon Weiss, Individually and as Officers of Said Corporation

Consent order requiring Bellmore, Long Island, N.Y., distributors to the general public of vitamins and other merchandise to cease representing falsely that delinquent customers' accounts were transmitted to an independent collection agency and, through use on letterheads of the fictitious name "The Mail Order Credit Reporting Association, Inc.", or "John J. Murphy, Attorney at Law", that a bona fide collection agency or an outside attorney was handling the account and that the customer's credit rating would suffer if payment was not made.

The order to cease and desist, including further order requiring report of compliance therewith, is as follows:

It is ordered, That respondents Timed Energy, Inc., a corporation, and its officers, and James E. True, Patricia M. Gallehr and Leon Weiss, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of vitamins or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

(1) a. Delinquent accounts will be turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that a prior determination had been made in good faith to make such referral;

b. Delinquent accounts have been turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that such is the fact;

(2) Delinquent accounts have been or will be turned over to "The Mail Order Credit Reporting Association, Inc." for collection or any other purpose;

(3) "The Mail Order Credit Reporting Association, Inc.", any other fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control is an independent, bona fide collection or credit reporting agency;

(4) A customer's name will be or has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondents establish that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

(5) "John J. Murphy" or any other person or firm is an outside, independent attorney at law or firm of attorneys representing respondents for collection of past due accounts unless respondents establish that a bona fide attorney client relationship exists between respondents and said attorney or attorneys, for purposes of collecting such accounts;

(6) Letters, notices or other communications which have been prepared or originated by respondents have been prepared or originated by any other person, firm or corporation.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Issued: June 11, 1964.

By the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 64-6586; Filed July 1, 1964; 8:46 a.m.]

SUBCHAPTER D—TRADE REGULATION RULES

PART 408—UNFAIR OR DECEPTIVE ADVERTISING AND LABELING OF CIGARETTES IN RELATION TO THE HEALTH HAZARDS OF SMOKING

Part 408 is added to Chapter I, Title 16, Code of Federal Regulations, reading as set forth below.

The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. sections 41, et seq., and the provisions of Subpart F of the Commission's Procedures and Rules of Practice, 28 F.R. 7083–84 (July 1963), has conducted a proceeding for the promulgation of a Trade Regulation Rule, or Rules, for the prevention of unfair or deceptive acts or practices in the sale of cigarettes. Notice of this proceeding, including a set of proposed Rules, was published in the FEDERAL REGISTER on January 22, 1964 (29 F.R. 530–532). Interested parties were thereafter afforded an opportunity to participate in the proceeding through the submission of written data, views and argument and to appear and express orally their views as to the proposed rules and to suggest revisions thereof and amendments and additions thereto. In adopting this rule,

the Commission has given due consideration to all such views, data and argument together with all other relevant matters of fact, law, policy and discretion.

Sec.
408.1 The rule.
408.2 Definitions.
408.3 Petition to reopen rule-making proceeding.
408.4 Effective dates.

AUTHORITY: The provisions of this Part 408 issued under Federal Trade Commission Act, as amended; 38 Stat. 717, as amended; 15 U.S.C. 41–58; 16 CFR 1.61–1.67.

§ 408.1 The rule.

The Commission, on the basis of the findings made by it in this proceeding, as set forth in the accompanying Statement of Basis and Purpose of Trade Regulation Rule, hereby promulgates as a trade regulation rule its determination that in connection with the sale, offering for sale, or distribution in commerce (as "commerce" is defined in the Federal Trade Commission Act) of cigarettes it is an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.

§ 408.2 Definitions.

For purposes of the rule in this part:

(a) "Cigarette" means any roll of tobacco wrapped in paper or otherwise commonly considered a cigarette.

(b) "Advertising" includes all radio and television commercials, newspaper and magazine advertisements, billboards, posters, signs, decals, matchbook advertising, point-of-sale display material, and all other written or other material used for promoting the sale or consumption of cigarettes, but does not include the labeling of packs, boxes, cartons and other containers in which cigarettes are sold to the consuming public.

§ 408.3 Petition to reopen rule-making proceeding.

In the event that any person subject to the rule in this part is of the opinion that new or changed conditions of fact or law, the public interest, or special circumstances require that the rule in this part be suspended, modified, waived, or repealed as to him, or otherwise altered or amended, such person may file with the Secretary of the Commission a petition to reopen this rule-making proceeding, stating the changes desired and the grounds therefor. The Commission will act on the petition as provided in § 1.66 of this chapter (the Commission's Procedures and Rules of Practice).

§ 408.4 Effective dates.

(a) Except with respect to advertising, the rule in this part shall become effective on January 1, 1965.

(b) With respect to advertising, the rule in this part shall become effective on July 1, 1965: *Provided, however,* That the Commission will entertain an application filed prior to May 1, 1965, by any interested party to postpone the effective date or otherwise suspend, modify, or abrogate the provisions of the rule in this part as to advertising, upon a showing of such change in circumstances as to justify such requested action in the public interest.

Issued: June 22, 1964.

By the Commission.[1]

[SEAL] JOSEPH W. SHEA, *Secretary.*

Statement of Basis and Purpose of Trade Regulation Rule

I. INTRODUCTION

A. *Past Commission actions in the field of cigarette advertising and public health.* The present Trade Regulation Rule proceeding is the culmination of many years of activity and concern by the Federal Trade Commission with respect to the lawfulness under the Federal Trade Commission Act (15 U.S.C. sections 41, et seq.) of cigarette advertising,[2] in the light of the questions of human health that have been raised concerning cigarette smoking. The Commission's jurisdiction over unfair trade practices in commerce extends, of course, to the merchandising of cigarettes as of other consumer products, and the Commission has been very active in this field since the 1930's.[3] Between 1945 and 1960 the Commission completed seven formal cease-and-desist order proceedings against cigarette manufacturers involving medical or health claims made in their advertising.[5] Many other proceedings have been settled informally.[4]

On September 15, 1955, the Commission promulgated Cigarette Advertising Guides (App. B, infra; see F.T.C. Ann. Rep., 1960, p. 82). Among other things, they prohibit representations, in cigarette advertising or labeling, which refer to either the presence or absence of any physical effects from cigarette smoking, or which make unsubstantiated claims respecting nicotine, tars, or other components of the cigarette smoke, or which in any other respects contain misleading implications concerning the health consequences of smoking cigarettes or the advertised brand. In 1960, the Commission obtained the agreement of the leading cigarette manufacturers to discontinue the confusing and unsubstantiated representations of tar and nicotine content which had characterized the so-called "tar derby." (F.T.C. Ann. Rep., 1960, p. 82.)

Since the promulgation of the Cigarette Advertising Guides, the Commission has maintained a close and continuous scrutiny of cigarette advertising practices, and has been deeply attentive to the progress of medical research into the health aspects of cigarette smoking. The Commission's staff has monitored all cigarette advertising during this period, and continues to monitor it today. Close contact has been maintained with the officials of the cigarette industry and with the public and private bodies that have been engaged in scientific research in this field.

With the mounting evidence, in recent years, of the very grave hazards to life and health involved in cigarette smoking (see Part II of this report, infra), the Commission's concern with fulfilling its statutory responsibilities in the area of cigarette merchandising has increased. The Commission's request for technical guidance from the United States Public Health Service on the labeling and advertising of tobacco products was among the factors which led the Surgeon General of the Public Health Service to announce, on June 7, 1962, that he was establishing an expert Advisory Committee to undertake a comprehensive review of all data on smoking and health.[5] This action was aproved by President Kennedy on the same day (ACR 8). The Associate Chief of the Division of Scientific Opinions of the Commission's Bureau of Deceptive Practices, a medical doctor, was one of the observers from interested federal agencies who participated in the initial deliberations of the Advisory Committee.

Months before the completion of the Report of the Surgeon General's Advisory Committee, the Commission organized, from among members of its staff, a task force consisting of attorneys, physicians, and economists, to review and make recommendations with respect to

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[1] Separate statement of Commissioner MacIntyre filed with the original document.

[2] Unless otherwise indicated, "advertising," as used throughout this report, includes labeling and all other promotional materials.

[3] See Julep Tobacco Co., 27 F.T.C. 1637 (1938) (stipulation forbidding claims that Julep cigarettes help counteract throat irritations due to heavy smoking and never make the throat dry or parched); Green River Tobacco Co., 27 F.T.C. 1547 (1938) (stipulation with respect to claims as to mildness and coolness).

[4] R. L. Swain Tobacco Co., 41 F.T.C. 312 (1945); P. Lorillard Co., 46 F.T.C. 735, order modified, id., at 853, aff'd, 186 F. 2d 52 (4th Cir. 1950), contempt proceeding, 6 F.T.C. Statutes and Court Decisions 490 (4th Cir. 1959); R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950), modified, 192 F. 2d 535 (7th Cir. 1951), on remand, 48 F.T.C. 682 (1952); American Tobacco Co., 47 F.T.C. 1393 (1951); Philip Morris & Co., Ltd., 49 F.T.C. 703 (1952), vacated and remanded on motion of Commission, 5 F.T.C. Statutes and Court Decisions 790 (D.C. Cir. 1953), complaint dismissed on affidavit of abandonment, 51 F.T.C. 857 (1955); Liggett & Myers Tobacco Co., preliminary injunction denied, 108 F. Supp. 573 (S.D.N.Y. 1952), aff'd mem., 203 F. 2d 956 (2d Cir. 1953), decision of Commission, 55 F.T.C. 354 (1958); Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960) (consent order). These proceedings are discussed at various points in this report. In addition, Appendix A to the report contains a brief summary of the acts or practices involved in every one of the Commission's past proceedings in the field of cigarette advertising, including those settled by stipulation.

[4] See notes 2 and 3 supra and Appendix A.

[5] Smoking and Health—Report of the Advisory Committee to the Surgeon General of the Public Health Service [hereinafter cited ACR], p. 8 (January 11, 1964). This report has been made a part of the public record of this proceeding; it is Ex. A. (As used herein, "Ex." refers to documents in the public record of this proceeding and "R." to the transcript of the public hearings in the proceeding.)

the Commission's responsibilities in the field of cigarette advertising and labeling. The Commission was prepared, when the Advisory Committee's Report was released on January 11, 1964, to act upon the Surgeon General's statement (made in announcing the release of the report) that, "Out of its long and exhaustive deliberations the [Advisory] Committee has reached the overall judgment that cigarette smoking is a health hazard of sufficient importance in the United States to warrant remedial action." (See F.T.C. News Release, January 11, 1964 (emphasis added).) On the same day, the Commission announced that it would "move promptly, within the scope of its statutory jurisdiction and responsibilities, to determine the remedial action which it should take in the public interest." (Ibid.)

B. *The Trade regulation rule proceeding.* On January 18, 1964, the Commission issued a Notice of Rule-Making Proceeding for the Establishment of Trade Regulation Rules for the Advertising and Labeling of Cigarettes (App. C, infra [5a]). The notice, including a set of proposed trade regulation rules, was published in the FEDERAL REGISTER (29 F.R. 530-32 (January 22, 1964)) and copies were sent to all known cigarette manufacturers and to other interested parties, including public-health officials, physicians, consumer organizations, and members of Congress.

The notice set forth the Commission's tentative views with respect to the requirements of the Federal Trade Commission Act, as applied to the advertising and labeling of cigarettes, in the light of the Report of the Surgeon General's Advisory Committee. It stated:

* * * * *

Protection of the consuming public from false, misleading, deceptive or unfair advertising (including labeling) of products that may endanger human health or safety is a prime duty of the Commission. The Commission has reason to believe that much current cigarette advertising may violate the laws administered by the Commission, in that it may prevent or hinder large numbers of consumers from recognizing and appreciating the nature and extent of the substantial health hazard of cigarette smoking.

Specifically, the Commission is concerned with two ways in which cigarette advertising may be unlawfully misrepresenting or concealing the health hazards of smoking. First, the Commission has reason to believe that many current advertisements falsely state, or give the false impression, that cigarette smoking promotes health or physical well-being or is not a health hazard, or that smoking the advertised brand is less of a health hazard than smoking other brands of cigarettes.

Second, the Commission has reason to believe that much current advertising suggests or portrays cigarette smoking as being pleasurable or desirable, compatible with physical health, fitness or well-being, or indispensable to full personal development and social success, without at the same time reminding the consumer of the serious health hazard of cigarette smoking. Such advertising may create a psychological and social barrier to the consuming public's understanding and appreciation of the gravity of the risks to life and health involved in cigarette smoking.

* * * * *

[5a] Appendix C filed as part of original document.

* * * It is established that a seller may not misrepresent, whether affirmatively or by failure of disclosure, the dangers to health or safety involved in using his product. Similarly, a literally true claim regarding the consequences to health or safety of using the product may nevertheless be deceptive because of failure to disclose material facts that limit and qualify the claim. The facts and the public interest may require application of these principles to cigarette advertising and labeling. Thus, if the dangers to health involved in cigarette smoking are so serious that knowledge and appreciation of them would be a material factor in influencing a person's decision whether, or how much, to smoke cigarettes or a particular brand of cigarettes, affirmative disclosure of these dangers in cigarette advertising may be a necessary antidote to advertising which, by design or otherwise, may tend to cloud or obscure public consciousness of the health perils of cigarette smoking.

* * * * *

* * * [T]he Commission invites consideration of the question whether, in the exercise of its statutory jurisdiction and responsibilities, the Commission should promulgate a Code of Fair Cigarette Advertising (under Subparts E or F of the Commission's Procedures and Rules of Practice) intended especially to protect the youth of the nation against unfair or deceptive acts or practices in cigarette advertising. The extensive advertising on television for cigarettes, on programs widely watched by young people, continuously projecting an image of cigarette smoking as a socially desirable and accepted activity, consistent with good health and physical well-being, may have a great impact on impressionable young minds, and may block appreciation of the serious health hazards of smoking cigarettes. There is evidence that "Men who began smoking before age 20 have a substantially higher death rate than those who began after age 25." (Advisory Committee's Report, p. 29.) This suggests the importance of protecting young people, lacking mature judgment, from being unduly influenced by cigarette advertising to take up smoking, a habit difficult to break. (Id., p. 34.)

The proposed trade regulation rules published with the notice provide:

RULE 1. Either one of the following statements shall appear, clearly and prominently, in every cigarette advertisement and on every pack, box, carton and other container in which cigarettes are sold to the public:

(a) "CAUTION—CIGARETTE SMOKING IS A HEALTH HAZARD: The Surgeon General's Advisory Committee on Smoking and Health has found that 'cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate' "; or

(b) "CAUTION: Cigarette smoking is dangerous to health. It may cause death from cancer and other diseases."

RULE 2. No cigarette advertisement* shall state or imply, by words, pictures, symbols, sounds, devices or demonstrations, or any combination thereof, that smoking the advertised cigarettes

(a) Promotes good health or physical well-being,

(b) Is not a hazard to health, or

(c) Is less of a hazard to health than smoking other brands, except that a specific and factual claim respecting the health consequences of smoking the advertised cigarettes may be advertised if

(1) The advertiser, before making the claim, has substantial and reliable evidence to prove the accuracy and significance of the claim, and

(2) All facts material to the health consequences of smoking the advertised cigarettes are clearly, prominently and intelligibly disclosed in close conjunction with the claim.

RULE 3. No cigarette advertisement shall contain any statement as to the quantity of any cigarette-smoke ingredients (e.g., tars and nicotine) which has not been verified in accordance with a uniform and reliable testing procedure approved by the Federal Trade Commission.

*For purposes of Rules 2 and 3, "advertisement" includes labeling. [Footnote in original.]

The notice further stated that all interested persons were invited to file written data, views or arguments concerning the proposed rules and the subject matter of the trade regulation rule proceeding with the Commission. The original time limit for such submissions was March 2, 1964, but was subsequently extended to May 15, 1964.[6] The Commission received, and has made a part of the public record of this proceeding, more than 500 letters and other documents from physicians and scientists, lawyers, psychologists, and other persons, and organizations of all kinds, commenting on the proposed rules and the subject matter of the proceeding.

Public hearings were held before the members of the Commission, commencing at 10:00 a.m. on March 16, 1964, and concluding on the afternoon of March 18. All persons desiring to express orally their views on the proposed rules and the subject matter of the proceeding were permitted to do so. The stenographic transcript of these hearings is 538 pages in length and has been made a part of the public record.

The witnesses at these hearings included a spokesman for the Tobacco Institute (the trade association of the cigarette industry), the Vice-Chairman of the Surgeon General's Advisory Committee, the President of the American Cancer Society, prominent doctors and research scientists, members of Congress, representatives of business, advertising, and consumer groups, and many others.

At the Commission's direction, the staff of the Commission prepared certain materials for inclusion in the public record of this proceeding. The Division of Scientific Opinions of the Bureau of Deceptive Practices gathered and excerpted statements on cigarette smoking and health by United States and foreign health associations, medical societies, governmental health bodies, and officials of international health organizations.[7] The Bureau of Economics prepared and submitted a 288-page report on cigarette advertising and output (Ex. C). This report includes a study of the role of the cigarette industry in the American economy and a study of cigarette consumption and advertising expenditures. Along with the report, the Bureau submitted six volumes of representative cigarette advertisements. The cigarette manufacturers were informed of the submission of these staff reports and were granted a one-month extension of time

[6] R. 6-7 (opening statement of Chairman Dixon); F.T.C. News Release, April 14, 1964.

[7] The excerpts are Ex. B; the underlying statements from which the excerpts are taken are contained in Appendices to Ex. B.

within which to submit views, argument and data thereon, should they desire to do so.[8]

In the notice of rule-making proceeding, in the proposed rules themselves, and in the staff reports to which reference has been made, a full and clear indication of the tentative views of the Commission on the subject matter of this proceeding was given. The Commission made every effort to ensure that the cigarette manufacturers, as well as all other interested persons, had actual and sufficient notice of the proposed courses of remedial action under consideration by the Commission. The Commission desired and expected that the cigarette industry would cooperate in the Commission's efforts to fulfill its statutory responsibilities in the field of cigarette advertising. The industry, however, chose to make only a limited presentation in the proceeding. It took the position that the Commission lacks authority to conduct such a proceeding and, alternatively, that if the Commission has such authority, it should not exercise it at this time.[9] The industry has submitted no data or information with respect to such matters as the health hazards of cigarette smoking, the prospects for development of less hazardous cigarettes, and the purpose and effects of cigarette advertising.[10]

C. *The limits of the Commission's role in the field of cigarette smoking and public health.* The Commission's jurisdiction is limited to unfair or deceptive trade practices. It has no general jurisdiction of public health or morals. In attempting to fulfill its statutory responsibilities to prevent unfair or deceptive cigarette advertising and labeling, the Commission should not be understood as attempting a comprehensive solution to the problem of cigarette smoking and public health, a vast social problem. Labeling and advertising restrictions could not, in any event, provide a complete answer to the social, moral, medical and economic issues raised by the widespread incidence of the smoking habit, especially among young people. But it does not follow that the Commission should not perform its clear statutory duties with respect to unfair or deceptive trade practices in the cigarette industry. The very gravity of the problem [11] makes it unthinkable that the Commission should abdicate its responsibility to take such remedial action as the law and the public interest require.

II. The Health Hazards of Cigarette Smoking

A. *Introduction: The background of the Advisory Committe's Report.* Scientific investigation into the association of tobacco use with various diseases began at least as early as 1900, but relatively little research was done until 1939, when the first controlled retrospective study of smoking and lung cancer was conducted.[12] Similar work was published in 1943, 1945 and 1948.[13] The investigatory pace quickened in 1950, when four such studies were published.[14] In 1952, two more were published,[15] and in 1953, four more.[16]

The year 1954 was a watershed in the history of smoking research. Four more retrospective surveys added to the accumulation of evidence indicating a relationship between smoking and lung cancer.[17] Perhaps more important, the first results of prospective studies were published.[18] Dr. Joseph Berkson has testified to the great popular impact of these prospective studies, noting that when the first Hammond-Horn report was published, "* * * the conclusion [was] * * * firmly announced, at least in the newspapers, that smoking causes cancer of the lung. * * * [W]e all heard, if in no other way than through vivid reports in the newspapers, that some investigations had shown conclusively that smoking causes cancer of the lung." [19]

In 1954, the accumulated evidence linking smoking with lung cancer made a sharp impact on the scientific community at large. The Public Health Cancer Association and the American Cancer Society adopted resolutions acknowledging an apparent association of smoking with lung cancer, and the British Ministry of Health published a report on Smoking and Lung Cancer.[20] And it was early in 1954 that tobacco manufacturers, growers and warehousers, "prompted by the appearance of certain publications claiming an established relationship between cigarette smoking and lung cancer," established the Tobacco Industry Research Committee to sponsor research into questions of tobacco and health and to "communicate authoritative factual information on the subject to the public." [21]

After 1954, a great quantity of new research was published, almost all of which tended to show that cigarette smoking is a cause of lung cancer and other diseases. Among the highlights of the post-1954 research are retrospective studies of lung cancer published in 1955,

[8] The staff materials were made a part of the public record on April 10, 1964. On April 14, the Commission announced that it was extending the deadline for written submissions from April 15 to May 15.

[9] See R. 83–A–83–B (statement on behalf of Tobacco Institute). The cigarette manufacturers have advised the Commission that they adopt the position taken by the Tobacco Institute in this proceeding. See Exs. 162, 164, 171, 178, 198, 239, 252. They have not otherwise advised the Commission of their views on this proceeding. Although the only appearance on behalf of the cigarette manufacturers in this proceeding was made by the Tobacco Institute, the Institute apparently takes the position that it has no authority to represent the industry in matters of advertising or labeling. Thus the President of the Institute recently stated: "Neither the Tobacco Institute nor the Tobacco Industry Research Committee, as I am informed, has any responsibility for or concern with the advertising and promotional activities of tobacco companies . . . ." Exs. 496, 499.

[10] Certain arguments with respect to the legality and wisdom of the proposed rules were made by the spokesman for the Tobacco Institute at the public hearings; they have been carefully considered by the Commission and are discussed elsewhere in this report. (See Part V–C, infra.)

[11] In 1962, 41,000 Americans died from lung cancer, 15,000 from chronic bronchitis and emphysema, and 578,000 from arteriosclerotic, coronary, and degenerative heart disease. ACR 25.

[12] Muller, Tabakmissbrauch und Lungencarcinom, Z. Krebsforsch (1939), cited in ACR 150. In retrospective studies, data from the personal histories and medical and mortality records of individuals in groups are considered; in prospective studies, "men and women are chosen randomly or from some special group, such as a profession, and are followed from the time of their entry into the study for an indefinite period, or until they die or are lost on account of other events." Id., at 6.

[13] Schairer and Schoeniger, Lungenkrebs und Tabakverbrauch, Z. Krebsforsch (1943); Potter and Tully, The Statistical Approach to the Cancer Problem in Massachusetts, American Journal of Public Health (1945); Wassink, Ontstaansvoorwaarden voor longkanker, Nederl T. Geneesk (1948), cited at ACR 150.

[14] Schrek, et al., Tobacco Smoking as an Etiologic Factor in Disease, I. Cancer, Cancer Research (1950); Mills and Porter, Tobacco Smoking Habits and Cancer of the Mouth and Respiratory System, Cancer Research (1950); Levin, Goldstein, and Gerhardt, Cancer and Tobacco Smoking: A Preliminary Report, Journal of the American Medical Association (1950); Wynder and Graham, Tobaco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of Six Hundred and Eighty-Four Proved Cases, Journal of the American Medical Association (1950), cited at ACR 150.

[15] McConnell, Gordon, and Jones, Occupational and Personal Factors in the Etiology of Carcinoma of the Lung, Lancet (London, 1952); Doll and Hill, A Study of the Aetiology of Carcinoma of the Lung, British Medical Journal (1952), cited at ACR 150.

[16] Sadowsky, Gilliam, and Cornfield, The Statistical Association Between Smoking and Carcinoma of the Lung, Journal of the National Cancer Institute (1953); Wynder and Cornfield, Cancer of the Lung in Physicians, New England Journal of Medicine (1953); Koulumies, Smoking and Pulmonary Carcinoma, Acta Radiol (Stockholm) (1953); Lickint, Atiologie und Prophylaxe des Lungenkrebses: 2. Statistische Voraussetzungen zur Klarung der Tabakarauchatiologie des Lungenkrebses (1953), cited at ACR 150.

[17] Breslow, et al., Occupations and Cigarette Smoking as Factors in Lung Cancer, American Journal of Public Health (1954); Watson and Conte, Smoking and Lung Cancer, Cancer (1954); Gzell, Carcinome bronchique et tabac, Medical Hygiene (1954); Randig, Untersuchungen zur Atiologie des Bronchialkarzinoms, Oeff Gesundheitsdienst (1954), cited at ACR 150.

[18] Doll and Hill, The Mortality of Doctors in Relation to Their Smoking Habits: A Preliminary Report, British Medical Journal (1954), cited at ACR 150. Hammond and Horn, The Relationship Between Human Smoking Habits and Death Rates: A Follow-up Study of 187,766 Men, Journal of the American Medical Association (1954).

[19] Berkson, Smoking and Cancer of the Lung (2d (June 1961) reprinting from Proc. Staff Meetings Mayo Clinic (June 22, 1960)), pp. 2, 6.

[20] Statements on Cigarette Smoking and Health by United States and Foreign Health Associations and Organizations, Medical Societies, Governmental Public Health Bodies and Officials, and International Health Organizations (Ex. B in this proceeding) [hereinafter cited "Statements"], App. I, Exs. 9, 3; App. II, Exs. 21, 22.

[21] H.R. Rep. No. 1372, False and Misleading Advertising (Filter-Tip Cigarettes), 85th Cong. 2d Sess. [hereinafter cited "H.R. Rep."], p. 3 (1958).

1956, and 1957;[22] the second report on the Doll and Hill prospective study (1956);[23] and an important pathological study (also in 1956).[24] To obtain a comprehensive review of the evidence, the American Cancer Society, the National Cancer Institute, the National Heart Institute, and the American Heart Association jointly sponsored a Study Group on Smoking and Health. On March 6, 1957, the Study Group issued its report, in which it concluded that:

The sum total of scientific evidence establishes beyond reasonable doubt that cigarette smoking is a causative factor in the rapidly increasing incidence of human epidermoid carcinoma of the lung.

The evidence of a cause-effect relationship is adequate for considering the initiation of public health measures. [Statements, App. I, Ex. 8.]

The British Medical Research Council completed a comprehensive review of the evidence in June 1957. Its conclusions were similar to those of the Study Group:

Evidence from many investigations in different countries indicates that a major part of the increase [in death rate from lung cancer] is associated with tobacco smoking, particularly in the form of cigarettes. In the opinion of the Council, the most reasonable interpretation of this evidence is that the relationship is one of direct cause and effect. [Id., App. II, Ex. 24.]

In July 1957, the Surgeon General of the United States Public Health Service, Dr. Leroy Burney, declared:

The Public Health Service feels the weight of the evidence is increasingly pointing in one direction: that excessive smoking is one of the causative factors in lung cancer. [ACR 7.]

Earlier the same year, at hearings held by the Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations (Blatnik Subcommittee), the Surgeon General had testified:

It is clear there is an increasing and consistent body of evidence that excessive cigarette smoking is one the causative factors in lung cancer. [H.R. Rep. 7.]

"Dr. [John R.] Heller, Director of the National Cancer Institute, told the subcommittee that the 'overwhelming majority' of scientists and physicians in the Public Health Service supported this position. He also estimated that 75 percent of physicians and scientists 'who have knowledge and some competence within this area' would also support the stand of the Surgeon General." (Ibid.)

While some dissent was expressed,[25] the evidence of the health hazards of smoking continued to mount.[26] In 1959, the Commissioner of Health of New York State found

* * * no reasonable doubt on the part of authoritative health agencies concerned with cancer that the use of tobacco acts in some way to increase the chances of developing lung cancer to a significant degree. [Statements, App. I, Exs. 49 and 45.]

In the same year, the American Public Health Association called for action because "scientific evidence has established that excessive cigarette smoking is a major factor [in lung cancer]" (Statements, App. I, Ex. 1); and Surgeon General Burney, reviewing the additional research since his 1957 statement, reiterated the belief of the Public Health Service that:

The weight of evidence at present implicates smoking as the principal etiological [causal] factor in the increased incidence of lung cancer.

Cigarette smoking particularly is associated with an increased chance of developing lung cancer.

No method of treating tobacco or filtering the smoke has been demonstrated to be effective in materially reducing or eliminating the hazard of lung cancer. [ACR 7.]

In 1960, further significant research was published.[27] In that year the Board of Directors of the American Cancer Society expressed its judgment that:

* * * the clinical, epidemiologic, experimental, chemical and pathological evidence * * * indicates beyond reasonable doubt that cigarette smoking is the major cause of the unprecedented increase in lung cancer. [Statements, App. I, Ex. 4.]

The National Tuberculosis Association warned:

* * * cigarette smoking is a major cause of lung cancer. * * *

* * * No present method of treating tobacco or filtering the smoke has been proved to reduce the harmful effects of cigarette smoking. * * * [Id., App. I, Ex. 6.]

A World Health Organization Study Group identified cigarette smoking as a major cause of lung cancer:

The Study Group unanimously agreed that that there was no reason to modify the conclusions reached by these experts [the "official, voluntary and other scientific bodies [which] have reviewed the evidence bearing on this association" between cigarette smoking and lung cancer] that the sum total of the evidence available today was most reasonably interpreted as indicating that cigarette smoking is a major causative factor in the increasing incidence of human carcinoma of the lung. Recognizing that this conclusion has not been accepted by all who have studied or written on the subject, the Study Group agreed that while some of the criticisms levelled did suggest avenues for further investigation, none could be considered as casting any serious doubt on the conclusions reached on the basis of the extensive studies already made. [Statements, App. III, Ex. 2.]

In 1961, the heads of the American Cancer Society, the American Public Health Association, the American Heart Association, and the National Tuberculosis Association urged the President of the United States to establish a commission to study the "widespread implications of the tobacco problem" (ACR 7). On January 4, 1962, representatives of these four organizations met with Surgeon General Luther L. Terry. Shortly thereafter, the Surgeon General recommended the establishment of an advisory committee composed of "outstanding experts who would assess available knowledge in this area [smoking and health] and make appropriate recommendations * * *". (ibid.).

Meanwhile, the Royal College of Physicians of London issued a report, Smoking and Health, in which it concluded:

Cigarette smoking is a cause of lung cancer, and bronchitis and probably contributes to the development of coronary heart disease and various other less common diseases. It delays healing of gastric and duodenal ulcers. [Statements, App. II, Exs. 28 and 29.]

On April 16, 1962, the Surgeon General proposed that the advisory group reevaluate the Public Health Service position, which had been expressed by Surgeon General Burney in 1959, in the light of certain significant developments between 1959 and 1962, among them new studies indicating that smoking has major adverse health effects and evidence that medical opinion had shifted significantly against smoking (ACR 7–8).

Also in 1962, smoking was characterized as a health hazard by the Board of Regents of the American College of Chest Physicians and by the Canadian Cancer Society. (Statements, App. I, Ex. 19; App. II, Ex. 15.) The Council of the

[22] Stocks and Campbell, Lung Cancer Death Rates Among Non-Smokers and Pipe and Cigarette Smokers: An Evaluation in Relation to Air Pollution by Benzpyrene and Other Substances, British Medical Journal (1955); Wynder, et al., Lung Cancer in Women: A Study of Environmental Factors, New England Journal of Medicine (1956); Segi, et al., An Epidemiological Study on Cancer in Japan, Gann (1957); Mills and Porter, Tobacco Smoking, Motor Exhaust Fumes, and General Air Pollution in Relation to Lung Cancer Incidence, Cancer Research (1957); Stocks, Cancer, Incidence in North Wales and Liverpool Region in Relation to Habits and Environment. IX. Smoke and Smoking, British Empire Cancer Campaign (1957); Schwartz and Denoix, L'enquete francaise sur l'etiologie du cancer broncho-pulmonaire: Role du tabac, Sem. Hop. Paris (1957), cited at ACR 150.

[23] Doll and Hill, Lung Cancer and Other Causes of Death in Relation to Smoking: A Second Report on the Mortality of British Doctors, British Medical Journal (1956), cited at ACR 150.

[24] Auerbach, et al., The Anatomical Approach to the Study of Smoking and Bronchogenic Carcinoma: A Preliminary Report of 41 Cases, Cancer (1956), cited at ACR 167.

[25] E.g., Berkson, supra note 19; Eastcott, The Epidemiology of Lung Cancer in New Zealand, Lancet (1956); Herdan, Increase in the Mortality Due to Cancer of the Lung in the Light of the Distribution of the Disease Among the Different Social Classes and Occupations, British Journal of Cancer (1958); Dean, Lung Cancer Among White South Africans, British Medical Journal (1959).

[26] See Haenszel, Shimkin, and Mantel, A Retrospective Study of Lung Cancer in Women, Journal of the National Cancer Institute (1958); Hammond and Horn, Smoking and Death Rates—Report on Forty-Four Months of Follow-up of 187,783 Men: I. Total Mortality, Journal of the American Medical Association (1958); Hammond and Horn, Smoking and Death Rates—Report on Forty-Four Months of Follow-up of 187,783 Men: II. Death Rates by Cause, Journal of the American Medical Association (1958); Dorn, The Mortality of Smokers and Non-Smokers, American Statistical Association, Proceedings of the Social Statistics Section (1958); Lombard and Snegireff, An Epidemiological Study of Lung Cancer, Cancer (1959), cited at ACR 150.

[27] Dunn, Linden, and Breslow, Lung Cancer Mortality Experience of Men in Certain Occupations in California, American Journal of Public Health (1960); Auerbach, et al., Microscopic Examination of Bronchial Epithelium in Children, American Review of Respiratory Diseases (1960), cited at ACR 150, 170.

American College Health Association observed that:

> A preponderance of scientific evidence (with scant counter evidence) indicates an association relationship and suggests a causal relationship between cigarette smoking and some diseases. * * * [Id., App. I, Ex. 14.]

The Dominion Council of Health of Canada found that "overwhelming evidence shows a direct relationship between cigarette smoking and lung cancer" id., App. II, Ex. 38), and the Canadian Medical Association declared that

> The causal relationship between smoking, particularly cigarette smoking, and the alarming increase in cancer of the lung is now accepted in medical and scientific circles. [Id., App. II, Ex. 9.]

The American Cancer Society published a booklet, "Cigarette Smoking and Cancer," in which it found no reasonable explanation other than causation for the "consistent association" between cigarette smoking and lung cancer. (Id., App. I, Ex. 5.) The Sub-committee on Bronchitis of the Standing Medical Advisory Committee of the Scottish Home and Health Department, "having reviewed the rapidly accumulating evidence, * * * [was] firmly of the view that smoking is one of the most important causes of bronchitis." (Id., App. II, Ex. 32.) And the First Report of an Export Committee on Cancer Control of the World Health Organization noted that "the relationship between cigarette-smoking and the rapidly increasing incidence of cancer of the lung is well known" (id., App. III, Ex. 3).

In 1963, the House of Delegates of the American Medical Association acknowledged its "* * * duty to point out the effects on the young of the use of toxic materials, including tobacco."[28] The Canadian Public Health Association accepted the evidence "that cigarette smoking is a major . . . cause of lung cancer" (Statements, App. II, Exs. 13 and 14). And the American Public Health Association adopted a resolution characterizing the current level of cigarette smoking as a "serious health hazard" (id., App. I, Ex. 2).

Finally, on January 11, 1964, the Report of the Surgeon General's Advisory Committee on Smoking and Health was published. Its judgment was that "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." (ACR 33.)

B. *The present state of knowledge concerning the health hazards of cigarette smoking.* 1. *The Report of the Surgeon General's Advisory Committee on Smoking and Health*—(a) *Genesis, Methodology, Etc.*—In 1962, the nation's highest public health officer, Dr. Luther L. Terry, the Surgeon General of the United States Public Health Service, "appointed a committee, drawn from all the pertinent scientific disciplines, to review and evaluate both this new and older data and, if possible, to reach some definitive conclusions on the relationship between smoking and health in general."[29] The data to which he had reference consisted of the mounting evidence, some of which we have already discussed, of the causal relationship between cigarette smoking and death from certain diseases. Specifically, Dr. Terry felt that the following new developments in the period 1959–1962 emphasized the need for a comprehensive and, if possible, definitive reexamination of the health issue:

1. New studies indicating that smoking has major adverse health effects.
2. Representations from national voluntary health agencies for action on the part of the Service.
3. The recent study and report of the Royal College of Physicians of London.
4. Action of the Italian Government to forbid cigarette advertising; curtailed advertising of cigarettes by Britain's major tobacco companies on TV; and a similar decision on the part of the Danish tobacco industry.
5. A proposal by Senator Maurine Neuberger that Congress create a commission to investigate the health effects of smoking.
6. A request for technical guidance by the Service from the Federal Trade Commission on labeling and advertising of tobacco products.
7. Evidence that medical opinion has shifted significantly against smoking. [ACR 8.]

The methodology of the Advisory Committee was agreed upon at a meeting at which the Tobacco Institute, along with other interested organizations such as the American Cancer Society and the American Medical Association, was represented. It was decided that "An objective assessment of the nature and magnitude of the health hazard * * * [would] be made by an expert scientific advisory committee which would review critically all available data but would not conduct new research. This committee would produce and submit to the Surgeon General a technical report containing evaluations and conclusions." (ACR 8.)

> The participants in the meeting * * * compiled a list of more than 150 scientists and physicians working in the fields of biology and medicine, with interests and competence in the broad range of medical sciences and with capacity to evaluate the elements and factors in the complex relationship between tobacco smoking and health. During the next month, these lists were screened by the representatives of organizations present at the July 27 meeting. Any organization could veto any of the names on the list, no reasons being required. Particular care was taken to eliminate the names of any persons who had taken a public position on the questions at issue. From the final list of names the Surgeon General selected ten men who agreed to serve on the * * * committee * * * [ACR 8–9.]

This method of selecting the members of the Advisory Committee reflected the Surgeon General's determination that "if it were humanly possible the new study would be done in such a way that something might be settled no matter what conclusions the Committee might reach, at least until substantial new evidence accumulated."[30] "[T]he members were to be competent and impartial in appearance and in fact." (R. 10, testimony of Dr. Hundley.) Thus, the cigarette industry had an absolute veto over nominees to the Advisory Committee (R. 32, testimony of Dr. Hundley); in addition, one of the 10 members of the Committee was nominated by the Tobacco Institute.[31]

The Advisory Committee's Report describes how its work was actually conducted (ACR 13–19):

> At the outset, the Surgeon General emphasized his respect for the freedom of the Com-

[28] Id., App. I, Ex. 11. In light of this resolution, the AMA's division of environmental medicine and medical services recently issued a booklet warning that, "The longer you smoke and the more you smoke the greater the risk of developing lung cancer." Wall Street Journal, Friday, May 8, 1964, p. 5, cols. 1–2.

[29] ACR, p. v. The President acknowledged and approved the Surgeon General's action on the same day. Ibid.

[30] R. 10 (testimony of Dr. James M. Hundley, Assistant Surgeon General of the United States Public Health Service and Vice-Chairman of the Advisory Committee).

[31] Ibid. The members of the Committee as finally selected were the following: (see ACR 9–10)

Stanhope Bayne-Jones, M.D., L.L.D., (Retired), Former Dean, Yale School of Medicine (1935–40); former President, Joint Administrative Board, Cornell University, New York Hospital Medical Center (1947–52); former President, Society of American Bacteriologists (1929); and American Society of Pathology and Bacteriology (1940). Field: Nature and Causation of Disease in Human Populations.

Dr. Bayne-Jones served also as a special consultant to the Committee staff.

Walter J. Burdette, M.D., Ph. D., Head of Department of Surgery, University of Utah School of Medicine, Salt Lake City. Fields: Clinical & Experimental Surgery; Genetics.

William G. Cochran, M.A., Professor of Statistics, Harvard University. Field: Mathematical Statistics, with Special Application to Biological Problems.

Emmanuel Farber, M.D., Ph. D., Chairman, Department of Pathology, University of Pittsburgh. Field: Experimental and Clinical Pathology.

Louis F. Fieser, Ph. D., Sheldon Emory Professor of Organic Chemistry, Harvard University. Field: Chemistry of Carcinogenic Hydrocarbons.

Jacob Furth, M.D., Professor of Pathology, Columbia University, and Director of Pathology Laboratories, Francis Delafield Hospital, New York, N.Y. Field: Cancer Biology.

John B. Hickam, M.D., Chairman, Department of Internal Medicine, University of Indiana, Indianapolis. Fields: Internal Medicine, Physiology of Cardiopulmonary Disease.

Charles LeMaistre, M.D., Professor of Internal Medicine, The University of Texas Southwestern Medical School, and Medical Director, Woodlawn Hospital, Dallas, Texas. Fields: Internal Medicine, Pulmonary Diseases, Preventive Medicine.

Leonard M. Schuman, M.D., Professor of Epidemiology, University of Minnesota School of Public Health, Minneapolis. Field: Health and Its Relationship to the Total Environment.

Maurice H. Seevers, M.D., Ph. D., Chairman, Department of Pharmacology, University of Michigan, Ann Arbor. Field: Pharmacology of Anesthesia and Habit-Forming Drugs.

Chairman: Luther L. Terry, M.D., Surgeon General of the United States Public Health Service.

Vice-Chairman: James M. Hundley, M.D., Assistant Surgeon General for Operations, United States Public Health Service.

mittee to proceed with the study and to report as it saw fit, and he pledged all support possible from the United States Public Health Service. The Service, represented chiefly by his office, the National Institutes of Health, the National Library of Medicine, the Bureau of State Services, and the National Center for Health Statistics, furnished the able and devoted personnel that constituted the staff at the Committee's headquarters in Washington, and provided an extraordinary variety and volume of supplies, facilities and resources. In addition, the necessary financial support was made available by the Service.

* * * * *

As the primary duty of the Committee was to assess information about smoking and health, a major general requirement was that of making the information available. That requirement was met in three ways. The first and most important was the bibliographic service provided by the National Library of Medicine. As the annotated monograph by Larson, Haag, and Silvette—compiled from more than 6,000 articles published in some 1,200 journals up to and largely into 1959—was available as a basic reference source, the National Library of Medicine was requested to compile a bibliography (by author and by subject) covering the world literature from 1958 to the present. In compliance with this request, the National Library of Medicine furnished the Committee bibliographies containing approximately 1100 titles. Fortunately, the Committee staff was housed in the National Library of Medicine on the grounds of the National Institutes of Health, and through this location had ready access to books and periodicals, as well as to scientists working in its field of interests. Modern apparatus for photo-reproduction of articles was used constantly to provide copies needed for study by members of the Committee. In addition, the members drew upon the libraries and bibliographic services of those institutions in which they held academic positions. A considerable volume of copies of reports and a number of special articles were received from a variety of additional sources.

All of the major companies manufacturing cigarettes and other tobacco products were invited to submit statements and any information pertinent to the inquiry. The replies which were received were taken into consideration by the Committee.

Through a system of contracts with individuals competent in certain fields, special reports were prepared for the use of the Committee. Through these sources much valuable information was obtained; some of it new and hitherto unpublished.

In addition to the special reports prepared under contracts, many conferences, seminar-like meetings, consultations, visits and correspondence made available to the Committee a large amount of material and a considerable amount of well-informed and well-reasoned opinion and advice.

To deal in depth and discrimination with the topics listed above, the Committee at its first meeting formed subcommittees with much overlapping in membership. These subcommittees were the main forces engaged in collection, analysis, and evaluation of data from published reports, contractual reports, discussions at conferences, and from some new prospective studies reprogrammed and carried out generously at the request of the Committee . . . . The first formulations of conclusions were made by these subcommittees, and these were submitted to the full Committee for revision and adoption after debate.

* * * * *

In making critical appraisals of data and interpretations and in formulating its own conclusions, the Surgeon General's Advisory Committee on Smoking and Health—its individual members and its subcommittees and the Committee as a whole—made decisions or judgments at three levels. These levels were:

I. Judgment as to the validity of a publication or report. Entering into the making of this judgment were such elements as estimates of the competence and training of the investigator, the degree of freedom from bias, design scope of the investigation, adequacy of facilities and resources, adequacy of controls.

II. Judgment as to the validity of the interpretations placed by investigators upon their observations and data, and as to the logic and justification of their conclusions.

III. Judgments necessary for the formulation of conclusions within the Committee.

The primary reviews, analyses and evaluations of publications and unpublished reports containing data, interpretations and conclusions of authors were made by individual members of the Committee and, in some instances, by consultants. Their statements were next reviewed and evaluated by a subcommittee. This was followed at an appropriate time by the Committee's critical consideration of a subcommittee's report, and by decisions as to the selection of material for inclusion in the drafts of the Report, together with drafts of the conclusions submitted by subcommittees. Finally, after repeated critical reviews of drafts of chapters, conclusions were formulated and adopted by the whole Committee, setting forth the considered judgment of the Committee.

The methodology of the Advisory Committee—the mode of selecting the members of the Committee and the comprehensive, scrupulous and exacting nature of the Committee's inquiry—appears to have been designed to assure maximum objectivity, disinterest and competence. In the words of the Vice-Chairman, Dr, Hundley, the objective was "a study and report that would be authoritative, conclusive, and which could be the basis for policy and action." (R. 11.)

That this objective has been attained is suggested by the following factors, among others: On January 27, 1964, shortly after the Report of the Advisory Committee had been released, the Surgeon General announced the "full acceptance of the principal findings and conclusions of the report" by the Public Health Service (R. 9). The President of the American Cancer Society has stated that he accepts the findings of the Committee "Absolutely" (R. 237). A prominent research scientist in the field has stated that the procedure and findings of the Committee were "conservative to an extreme," and that no public or private body which wanted to inform itself, objectively and impartially, as to the state of the evidence on the health hazards (if any) of cigarette smoking, could have done a more adequate job of inquiry and analysis (R. 323, testimony of Dr. Bock). Significantly, also, the cigarette manufacturers, in their appearance before the Commission in this proceeding, made no challenge whatever to the procedure or findings of the Advisory Committee.

The Commission concludes that the Report of the Advisory Committee is of the highest authority and reliability. Its essential findings stand unchallenged and uncontroverted in this proceeding.

(b) *Findings.* Excerpts from the findings and conclusions of the Advisory Committee's Report follow:

On the basis of prolonged study and evaluation of many lines of converging evidence, the Committee makes the following judgment:

Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action. [ACR 33.]

* * * * *

Cigarette smoking is associated with a 70 percent increase in the age-specific death rates of males, and to a lesser extent with increased death rates of females. The total number of excess deaths causally related to cigarette smoking in the U.S. population cannot be accurately estimated. In view of the continuing and mounting evidence from many sources, it is the judgment of the Committee that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. [Id., at 31.]

* * * * *

In general, the greater the number of cigarettes smoked daily, the higher the death rate. For men who smoke fewer than 10 cigarettes a day, according to the seven prospective studies, the death rate from all causes is about 40 percent higher than for non-smokers. For those who smoke from 10 to 19 cigarettes a day, it is about 70 percent higher than for non-smokers; for those who smoke 20 to 39 a day, 90 percent higher; and for those who smoke 40 or more, it is 120 percent higher.

Cigarette smokers who stopped smoking before enrolling in the seven studies have a death rate about 40 percent higher than non-smokers, as against 70 percent higher for current cigarette smokers. Men who began smoking before age 20 have a substantially higher death rate than those who began after age 25. Compared with non-smokers, the mortality risk of cigarette smokers, after adjustments for differences in age, increases with duration of smoking (number of years), and is higher in those who stopped after age 55 than for those who stopped at an earlier age.

In two studies which recorded the degree of inhalation, the mortality ratio for a given amount of smoking was greater for inhalers than for non-inhalers. [Id., at 29.]

* * * * *

Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction.

The risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day, and is diminished by discontinuing smoking. In comparison with non-smokers, average male smokers of cigarettes have approximately a 9- or 10-fold risk of developing lung cancer and heavy smokers at least a 20-fold risk. [Id., at 31.]

* * * * *

Cigarette smoking is the most important of the causes of chronic bronchitis in the United States, and increases the risk of dying from chronic bronchitis.

A relationship exists between pulmonary emphysema and cigarette smoking but it has not been established that the relationship is causal. The smoking of cigarettes is associated with an increased risk of dying from pulmonary emphysema.

For the bulk of the population of the United States, the importance of cigarette smoking as a cause of chronic bronchopulmonary disease is much greater than that of atmospheric pollution or occupational exposures.

Cough, sputum production, or the two combined are consistently more frequent among cigarette smokers than among nonsmokers.

Cigarette smoking is associated with a reduction in ventilatory function. Among males, cigarette smokers have a greater prevalence of breathlessness than nonsmokers. [Id., at 38.]

* * * * *

The habitual use of tobacco is related primarily to psychological and social drives, reinforced and perpetuated by the pharmacological actions of nicotine on the central nervous system. [Id., at 34.]

* * * * *

Smokers and users of tobacco in other forms usually develop some degree of dependence upon the practice, some to the point where significant emotional disturbances occur if they are deprived of its use. The evidence indicates this dependence to be psychogenic in origin. In medical and scientific terminology the practice should be labeled habituation to distinguish it clearly from addiction, * * * [but] correctly designating the chronic use of tobacco as habituation rather than addiction carries with it no implication that the habit may be broken easily. [Id., at 350–51.]

* * * * *

At the 12th grade level, between 40 to 55 percent of children have been found to be smokers. By the age 25, estimates of smoking prevalence run as high as 60 percent of men and 36 percent of women. * * * More recent but limited data suggest that there has been an increment in smoking prevalence at all age levels since the early fifties . . . .

[It is estimated] that 10 percent of later smokers "develop the habit with some degree of regularity" before their teens and 65 percent during their high school years. [Id., at 361–62.]

* * * * *

All available knowledge points towards the years from the early teens to the age of 20 as a significant period during which a majority of later smokers began to develop the active habit. [Id., at 368.]

* * * * *

The cultural milieu seems to have a strong influence, a permissive cultural climate tending to promote and a rejecting or outright prohibitive one to inhibit smoking. [Id., at 377.]

* * * * *

The overwhelming evidence points to the conclusion that smoking—its beginning, habituation, and occasional discontinuation—is to a large extent psychologically and socially determined. [Ibid.]

The Advisory Committee explained its use of the language of causation to describe some of its findings, notably with respect to lung cancer: "it is to be noted clearly that the Committee's considered decision to use the words 'a cause,' or 'a major cause,' or 'a significant cause,' or 'a causal association' in certain conclusions about smoking and health affirms their conviction." (Id., at 21.) Thus, it is clear that the Committee regarded its crucial findings as to the dangers of cigarette smoking not as tentative or hypothetical, but as clearly compelled by the evidence. In finding causal relationships between smoking and certain diseases, incidentally, the Committee expressly stated that "Statistical methods cannot establish proof of a causal relationship in an association." (Id., at 20.) It should also be noted that the Advisory Committee's findings are not limited to any particular brand or type of cigarette, but embrace cigarette smoking in general. The Committee made no finding that any cigarette currently produced is safe or safer than other cigarettes. See R. 15–16 (testimony of Dr. Hundley).

2. *The present scientific consensus regarding the health hazards of smoking.* As our review in subpart A, supra, of the evolution of expert scientific opinion in the field of smoking and health has made apparent, the findings and conclusions of the Advisory Committee's Report can hardly be considered a "bolt from the blue"—an isolated, sudden, or novel judgment on the evidence. On the contrary, the Report is the culmination and distillation of a series of careful and expert analyses of the accumulated research, all of which have reached essentially the same conclusion: that cigarette smoking is a sufficiently substantial, proven health hazard to warrant governmental remedial action. The authority of the Advisory Committee's Report is enhanced by the existence of a consensus of expert opinion on the Report's principal findings and conclusions.

For example, in 1962 there appeared Smoking and Health: Summary and Report of the Royal College of Physicians of London on Smoking in Relation to Cancer of the Lung and other Diseases. (Statements, App. II, Ex. 28.) In this thorough and careful appraisal of the evidence, which took several years to complete and is comparable in scope to the Advisory Committee's Report, it was found:

Cigarette smoking is a cause of lung cancer, and bronchitis and probably contributes to the development of coronary heart disease and various other less common diseases. * * * The chance of dying in the next ten years for a man aged 35 who is a heavy cigarette smoker is 1 in 23 whereas the risk for a non-smoker is only 1 in 90. Only 15 percent (one in six) of men of this age who are non-smokers but 33 percent (one in three) of heavy smokers will die before the age of 65. Not all this difference in expectation of life is attributable to smoking. [p. S7.]

* * * * *

General discouragement of smoking, particularly by young people, is necessary. More effort needs to be expended on discovering the most effective means of dissuading children from starting the smoking habit . . . . There can be no doubt of our responsibility for protecting future generations from developing the dependence on cigarette smoking that is so widespread today.

Most adults have heard of the risks of cigarette smoking but remain unconvinced. Doctors, who see the consequences of the habit, have reduced their cigarette consumption. Some evidence of concern by the Government is needed to convince the public. [pp. S7–S8.]

Also, as noted earlier, many other expert bodies have reviewed the evidence and concluded that the substantial health hazards of cigarette smoking are clearly established. They include the World Health Organization, the British Ministry of Health, the American Public Health Association and the American Cancer Society. No disinterested expert body, upon a systematic review of the evidence, has reached conclusions opposed to those of the College of Royal Physicians, the Surgeon General's Advisory Committee, and the many other highly competent and reliable organizations that have expressed themselves on the subject. Although there may not yet be complete unanimity on the question,[32] there is plainly an authoritative consensus of qualified expert opinion.

C. *The Commission's reliance on the Report of the Surgeon General's Advisory Committee.* Does the Advisory Committee's Report—its findings and conclusions—provide an appropriate basis for remedial action by the Commission in the form of a trade regulation rule? Or must the Commission, rather than rely upon the Report, make an independent, de novo inquiry into whether, in fact, cigarette smoking is a substantial health hazard, as the Report found? In the particular circumstances, the former is a proper course for the Commission to take; moreover, it is the only practical course consistent with its statutory responsibilities.

The Commission is fully competent to make findings with respect to the medical or other scientific issues which frequently arise in the course of proceedings before it. It does so constantly. It entertains the opinion of qualified experts and weighs their testimony. Its findings need not rest upon unanimous expert opinion; the fact that there is a conflict in the expert testimony before the Commission on a medical or scientific issue does not preclude a finding with respect to that issue; and the finding need only be based on substantial evidence to be upheld by a reviewing court.[33]

The findings on the health hazards of cigarette smoking that have been made by the Surgeon General's Advisory Committee on Smoking and Health warrant the Commission's full reliance. The Report of the Advisory Committee does not simply express the opinion of a group of experts, which must be weighed against the opinions of other experts before a final determination can be made. The report is unique in several respects.

In the first place, the Advisory Committee was not a private group of experts. It was convened under the auspices of the United States Public Health Service—the nation's highest governmental body in the field of public health—and its chairman was the Surgeon General of the Service—the nation's highest medical official. Its findings and conclusions have been formally approved by the Public Health Service. The public status of the Committee entitles its findings and conclusions to the greatest respect. Cf. James S. Kirk & Co. v. F.T.C., 59 F. 2d 179 (7th Cir. 1932).

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[32] See, e.g., Ex. 318(n) (letter from Dr. Joseph Berkson).

[33] See, e.g., Wybrant System Products Corp. v. F.T.C., 266 F. 2d 571 (2nd Cir. 1959) (per curiam); Erickson Hair & Scalp Specialists, Inc. v. F.T.C., 272 F. 2d 318, 321 (7th Cir. 1959); Aronberg v. F.T.C., 132 F. 2d 165 (7th Cir. 1942); Justin Haynes & Co. v. F.T.C., 105 F. 2d 988, 989 (2nd Cir. 1939); John J. Fulton Co. v. F.T.C., 130 F. 2d 85 (9th Cir. 1942); Neff v. F.T.C., 117 F. 2d 495 (4th Cir. 1941); Charles of the Ritz Dist. Corp. v. F.T.C., 143 F. 2d 676 (2nd Cir. 1944); J. E. Todd, Inc. v. F.T.C., 145 F. 2d 858 (D.C. Cir. 1944).

Moreover, the Advisory Committee was established for the express purpose of weighing the opinions of the medical and other scientific experts in the field of smoking and health in order to arrive at a determination sufficiently definitive to provide a basis for appropriate remedial action by public agencies, such as the Federal Trade Commission, having statutory responsibilities in the field. The Committee, accordingly, did not itself engage in research; nor was it composed of persons who had done research, or taken a position, publicly or privately, or were in any way partial, on the question of smoking and health. The job of the Committee was to weigh the evidence, much like a jury of experts,[34] rather than to gather more evidence. The Committee was created as a specialized and impartial (albeit ad hoc) body to appraise certain medical and scientific evidence, just as the Trade Commission was created as a specialized and impartial body to appraise evidence regarding business practices.

The impartiality of the Committee and the fairness and objectivity of its procedures are beyond dispute. The members of the Committee were selected, and its methods of operation and general approach devised, in full cooperation with the cigarette industry and were fully acceptable to the industry. The Committee was the agreed-upon means of arbitrating the scientific aspects of the smoking and health controversy for the purpose of enabling such remedial action as might be appropriate. For the Trade Commission to re-examine de novo the findings of the Advisory Committee would subvert the basic purpose behind the Committee, which was to settle the controversy, by means acceptable to the industry as well as to the health organizations, at least until substantial new evidence should become available.

It is difficult to conceive on what basis an agency, whether the Commission or any other, would assume to re-examine the evidentiary foundation of the findings of the Advisory Committee. What body would have greater objectivity or expertise than the Committee? What body would be competent to pronounce the Committee's findings and conclusions contrary to the weight of the evidence? By agreement between the cigarette industry and other interested agencies and organizations, the Advisory Committee was given, as it were, "primary jurisdiction"[35] to determine the health hazards of smoking. Since the Advisory Committee is the body having special competence to determine the health hazards of smoking, the Commission accepts the Committee's findings and conclusions, which are unimpeached and were made in accordance with impartial, objective, and thoroughly reliable procedures.

The findings and conclusions of the Advisory Committee's Report represent, in light of the nature of the issues and the gravity of the smoking and health problems, a compelling basis for remedial action by the Federal Trade Commission within its statutory jurisdiction and responsibilities for the prevention of unfair or deceptive acts and practices in commerce.

III. Cigarette Advertising

A. *The significance of cigarettes in the American economy.* Before commencing the analysis (in subparts B, C, and D, infra) of the magnitude, content, and effects of cigarette advertising, it may be useful to examine briefly the significance of cigarettes in the American economy. This examination relies primarily upon data in Part I of the report prepared by the Bureau of Economics for this proceeding, entitled A Report on Cigarette Advertising and Output (Ex. C; hereinafter cited as Bureau Report). Part I of that report contains a considerably more detailed statement relating to the significance of cigarettes in the American economy.

1. *Relative importance of cigarettes in the American economy.* In 1963, consumer expenditures for cigarettes totaled $7.1 billion and constituted approximately 1.9 percent of total personal consumption expenditures.[36] These expenditures included approximately $3 billion in Federal and State cigarette taxes. During fiscal year 1963, Federal and State cigarette taxes equaled $3.2 billion and constituted 2.8 percent of total Federal and State tax collections (exclusive of employment taxes). (Bureau Report 12.)

Department of Agriculture data indicate that during 1963, tobacco cash receipts amounted to $1.3 billion and accounted for 3.5 percent of the cash receipts of farmers from all farm commodities. (Annual Report on Tobacco Statistics, 1963, p. 21.) Latest Census of Agriculture data indicate that during 1959 more than 70 percent of tobacco production was accounted for by 190,000 commercial tobacco farms. These farms represented 7.9 percent of all commercial farms. Tobacco was also produced by commercial farms for which it represented a secondary source of revenue and by noncommercial farms, that is, farms with value of sales amounting to less than $2,500. During 1959, a total of 417,000 farms produced some tobacco. These farms constituted 11.2 percent of the 3.7 million commercial and noncommercial farms in the United States as of 1959. (Bureau Report 15.)

During 1963, a total of 16 States had cash receipts from tobacco in excess of $3 million; in only seven States, however, did tobacco receipts in 1963 exceed 10 percent of total cash receipts from all farm commodities. The leading four States in both total tobacco production and relative dependence upon tobacco were North Carolina, Kentucky, South Carolina and Virginia. For these States, receipts from tobacco respectively represented 46.4 percent, 39.6 percent, 24.9 percent and 18.8 percent of total cash receipts. In all four States, cigarette-type tobaccos are the principal tobacco crop. The combined total for the tobacco cash receipts accounted for by the four States equalled $971 million during 1963 and represented 77.6 percent of the $1.3 billion total for United States tobacco cash receipts. (Annual Report on Tobacco Statistics, 1963, p. 21.)

Data on the relative importance of tobacco products manufacturing are available in the 1962 Annual Survey of Manufactures. These data indicate that value added by manufacture at tobacco products manufacturing establishments constituted 0.9 percent of total value added by manufacture. Of total value added at tobacco products manufacturing establishments, 76 percent was accounted for by activities at cigarette manufacturing establishments. 37,000 persons were employed at cigarette manufacturing establishments during 1962, which represented 0.2 percent of total employment at all manufacturing establishments.

The location of cigarette manufacturing is indicated by data from the 1958 Census of Manufactures. These data indicate that three States, North Carolina, Virginia and Kentucky, accounted for 99.8 percent of value added by manufacture at cigarette manufacturing establishments during 1958. Of total value added at cigarette manufacturing establishments, North Carolina accounted for 57.1 percent, Virginia for 22.4 percent, and Kentucky for 20.3 percent. (Bureau Report 20–21).

Census data also indicate that wholesale establishments primarily engaged in the assembly of leaf tobacco or in the distribution of tobacco products during 1958 employed 35.1 thousand employees or 1.3 percent of the employees of all wholesale trade establishments. No such data are available for the retail or service trades because the bulk of tobacco products are sold by establishments not primarily engaged in the sale of tobacco products. For example, it is estimated by trade sources that food stores and drug stores account for approximately half of cigarette sales. It is further estimated that tobacco products accounted for approximately 4 percent of food store sales and 8 percent of drug store sales. (Id., at 22.)

Census data are available from the 1958 Census of Business for two kinds of retail businesses which deal primarily in tobacco products, "cigar stores and

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[34] In the words of Surgeon General Terry, "The Advisory Committee on Smoking and Health, which examined the evidence and reached a unanimous verdict, was a scientific jury." Address, National Conference on Smoking and Youth, June 10–11, 1964, p. 3.

[35] "[T]he doctrine of 'primary jurisdiction' * * * requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." United States v. Philadelphia National Bank, 374 U.S. 321, 353 (1963). The doctrine is frequently explained (in part) in terms of the superior competence of the agency to pass upon questions within the scope of its special responsibilities. See, e.g., Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922); Far East Conference v. United States, 342 U.S. 570 (1952); 3 Davis, Administrative Law 1–55 (1958); Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. Cin. L. Rev. 261 (1961).

[36] U.S. Department of Agriculture, Annual Report on Tobacco Statistics, 1963, April 1964, p. 52; Survey of Current Business, April 1964, p. S–1.

stands" and "merchandise vending machine operators dealing primarily in tobacco products." Data for 1958 indicate that sales by establishments in these trades amounted to $543.9 million, or 0.3 percent of all retail sales. (Ibid.)

Data on the relative importance to various media of cigarette advertising indicate that during 1962 the six leading cigarette manufacturers accounted for an estimated 10.3 percent of network television advertising expenditures, 3.8 percent of expenditures for spot television by national advertisers, 3.2 percent of national advertising in general magazines, and 2.4 percent of national advertising in newspapers (including Sunday supplements). (Id., at 28.)

2. *The Current Status of Cigarette Consumption and Advertising.* In physical terms, total domestic consumption of cigarettes during 1963 equaled 509.6 billion units. Calculated on a per capita basis for persons 18 years of age and older, domestic consumption during 1963 equaled 4,345 cigarettes per year. (Annual Report on Tobacco Statistics, 1963, pp. 48, 52.)

As shown in table 1, the leading six cigarette manufacturers accounted for more than 99 percent of total cigarette production for domestic consumption during 1963. The balance, equal to less than 0.5 percent, was accounted for by three companies—the United States Tobacco Company, Larus and Brother, and Stephano Brothers.

TABLE 1.—CIGARETTE MARKET SHARES OF LEADING 6 COMPANIES: 1963

Company	Output for domestic consumption (billion of cigarettes)	Percent of total
All companies, total	509.0	100.0
R. J. Reynolds	174.4	34.3
American Tobacco	126.2	24.8
P. Lorillard Co	55.7	10.9
Brown & Williamson	53.4	10.5
Liggett & Myers	49.4	9.7
Philip Morris	48.1	9.4
All others	1.8	.4

SOURCE: *Printers' Ink*, Feb. 14, 1964, p. 27.

Although more than 40 brands of cigarettes were marked during 1963, approximately 80 percent of domestic consumption was accounted for by the 10 leading brands, more than 95 percent by the 20 leading brands, and more than 99 percent by the 30 leading brands. Table 2 presents domestic market share data for each of the 30 leading brands of 1963. In the case of brands, such as Chesterfield, which market more than one type of cigarette under a single brand name, separate totals are shown for each type of cigarette. Different rankings would of course result if combined totals were shown for such brands. For example, on a combined basis Chesterfield would have ranked ninth in 1963; shown separately, Chesterfield Kings ranked twelfth in 1963 and Chesterfield Regulars ranked sixteenth.

Available data on cigarette advertising expenditures indicate that total expenditures during 1963 exceeded $200 million. Advertising expenditure data are available from both governmental and trade sources. Unfortunately, none of the data is completely satisfactory. Internal Revenue Service data, for example, include advertising expenditures for products other than cigarettes. It is estimated, however, that such expenditures are not substantial. Trade publication data, on the other hand, do not include all media. Nevertheless, the data available are sufficient both to estimate the relative importance of cigarette advertising and to indicate current and prior magnitudes.

TABLE 2.—DOMESTIC MARKET SHARES DURING 1963 FOR THE 30 LEADING CIGARETTE BRANDS

Brand	Type [1]	Company	Rank	Percent of total
All brands, total				100.0
Pall Mall	K	American Tobacco	1	14.3
Winston	F	R. J. Reynolds	2	13.6
Camel	R	do	3	11.8
Salem	M	do	4	8.8
Kent	F	P. Lorillard	5	7.3
Lucky Strike	R	American Tobacco	6	7.1
L & M	F	Liggett & Myers	7	5.4
Marlboro	F	Philip Morris	8	5.0
Viceroy	F	Brown & Williamson	9	3.7
Kool	M	do	10	3.1
Tareyton	F	American Tobacco	11	2.5
Chesterfield	K	Liggett & Myers	12	2.1
Parliament	F	Philip Morris	13	2.0
Raleigh	F	Brown & Williamson	14	1.9
Newport	M	P. Lorillard	15	1.7
Chesterfield	R	Liggett & Myers	16	1.7
Old Gold	F	P. Lorillard	17	1.0
Belair	M	Brown & Williamson	18	.9
Philip Morris	K	Philip Morris	19	.8
Raleigh	K	Brown & Williamson	20	.7
Philip Morris	R	Philip Morris	21	.6
Tareyton	K	American Tobacco	22	.5
Alpine	M	Philip Morris	23	.5
Montclair	M	American Tobacco	24	.5
Paxton	M	Philip Morris	25	.4
Lark	F	Liggett & Myers	26	.3
Spring	M	P. Lorillard	27	.3
York	K	do	28	.2
Old Gold	K	do	29	.2
Do	R	do	30	.2
All other brands				.9

[1] R=regular, K=king-size, F=filter (includes filter-kings), M=menthol (includes menthol filter-kings and regular size menthol cigarettes).

SOURCE: Bureau Report, table 23, p. 40.

The most recently available Internal Revenue Service data indicate that the six leading cigarette manufacturers incurred total advertising expenditures of $236.4 million during 1960. (Bureau Report 3.) These expenditures amounted to 4.5 percent of the advertising expenditures of all manufacturing corporations and 2.5 percent of the advertising expenditures of all corporations.[37]

Data by media, for 1962, indicate that the six leading cigarette manufacturers spent $109 million for television advertising, $27.2 million for advertising in general magazines, $17.7 million for newspaper advertising, $19.3 million for network radio, and almost $1.7 million for outdoor advertising. Total spending for these media equaled $174.9 million. (Bureau Report 28.) Network television expenditures equaled $81.9 million and accounted for 75 percent of the television total; network television represented the single most important medium for cigarette advertising.

Data for 1963 indicate increases in spending over 1962 by the six leading cigarette manufacturers for network and spot television, and general magazines. Totals reported are $89.3 million for network television, $36.1 million for spot television, and $31.8 million for general magazines. (Advertising Age, April 6, 1964, p. 94 and April 13, 1964, p. 101.) They represent increases over 1962 of 9, 32 and 17 percent, respectively.

B. *Cigarette consumption and advertising expenditures: 1950–1963.* 1. *Cigarette consumption since 1950.* As indicated by data in table 3, total and per capita cigarette consumption increased during each of the years of the period 1950 to 1963, with the exception of 1953 and 1954. In the case of per capita consumption there was also an insignificant decline during 1962. It should be noted that per capita consumption data are calculated for persons 18 years of age and over and are calculated on a base which includes both smokers and nonsmokers. During the period 1953–1954, the decline in total consumption amounted to 25.4 billion units and equaled 6.4 percent of the 1952 total. It was not until 1957 that the 1952 total had been exceeded. The 1953 and 1954 declines in total consumption are particularly notable because yearly increases in cigarette consumption have otherwise been almost uninterrupted since 1913. (Bureau Report 2.)

[37] Id., at 7; U.S. Treasury Department, Internal Revenue Service, Statistics of Income, 1960–1, Corporation Income Tax Returns, Table 2.

TABLE 3.—TOTAL AND PER CAPITA CIGARETTE CONSUMPTION: 1950 TO 1963

Year	Total domestic cigarette consumption* (billions of cigarettes)	Cigarette consumption per capita 18 years and over** (number of cigarettes)
1963	509.6	4,345
1962	494.5	4,265
1961	488.1	4,266
1960	470.1	4,172
1959	453.7	4,071
1958	436.4	3,949
1957	409.4	3,751
1956	393.2	3,647
1955	382.1	3,595
1954	368.7	3,544
1953	386.8	3,702
1952	394.1	3,884
1951	379.7	3,743
1950	360.2	3,522

*Bureau Report, table 1, p. 3.
**Annual Report on Tobacco Statistics, 1963, p. 52.

The decline in per capita consumption during the two-year period 1953 to 1954 equaled 8.8 percent and it was not until 1958 that the 1952 total had been exceeded. The 1953 and 1954 declines in total and per capita consumption may be characterized as substantial but short-lived reactions to the mounting evidence during the early 1950's of a linkage between cigarette smoking and lung cancer. (See Part II, supra.)

For the entire period 1950 to 1963, table 3 indicates that total consumption increased from 360.2 billion units in 1950 to 509.6 billion units in 1963, or by 41.1 percent. During the same period, per capita consumption, calculated for persons 18 years of age and over, increased from 3,522 cigarettes per year in 1950 to 4,345 cigarettes per year in 1963, or by 23.4 percent. The greater increase in total than per capita consumption certainly reflects the increase in total United States population since 1950. If no other factors had been at work, however, per capita consumption might have remained constant instead of increasing by 23.4 percent.

On the basis of available data on smoking patterns, it would appear that both the increase in per capita consumption and the relatively greater increase in total consumption particularly reflect the effect of increases in the proportion of smokers to nonsmokers in younger age groups, especially among females. Available data on smoking patterns of the United States population are summarized in the Report of the Surgeon General's Advisory Committee on Smoking and Health:

> As far as is known from actual data, few children smoke before the age of 12, probably less than five percent of the boys and less than one percent of the girls. From age 12 on, however, there is a fairly regular increase in the prevalence of smoking. At the 12th grade level, between 40 to 55 percent of children have been found to be smokers. By age 25, estimates of smoking prevalence run as high as 60 percent of men and 36 percent of women. There is a further increase up to 35 and 40 years after which a drop is observed. In the 65 and over age group, prevalence of smoking is only approximately 20 percent among men and four percent among women.
>
> These distributions are based on cross-sectional rather than longitudinal data and may be subject to considerable change over the years as each generation of smokers carries its own smoking pattern into higher age brackets. It is also conceivable that increased public attention to possible hazards of smoking within the last few years led to some decrease in the number of smokers, a decrease not evenly distributed among the several age groups. Since these statistics were collected several years ago, they may not reflect current age distributions. More recent but limited data suggests that there has been an increment in smoking prevalence at all age levels since the early 50's.
>
> Fewer women smoke than men and their smoking is almost entirely restricted to cigarettes. However, the proportion of women smokers has increased faster than that of men smokers in recent years. [ACR 362-63.]

One of the studies cited by the Surgeon General's Report was conducted by the Census Bureau for the National Cancer Institute of the United States Public Health Service. (Haenszell, Shimkin, and Miller, Tobacco Smoking Patterns in the United States, Public Health Monograph No. 45 (1956).) It contains a more detailed analysis of smoking patterns and is based upon data obtained from a sample survey conducted during February 1955 as part of the Current Population Survey. The Public Health Service report indicates that: "The trend to regular smoking at earlier ages has been most pronounced for females. For example, the age by which 20 percent of the women become regular smokers has dropped from 21.3 years among those born between 1910 and 1920 to 19.0 and 18.5 years among the groups born between 1920 and 1930 and in 1930 or later. Among men, the corresponding figure has remained stable at about 15.6 years." (Id., at 17.)

The Public Health Service report also confirms the existence of a "* * * rising trend in the proportion of regular smokers in successive cohorts" (id., at 16), that is, successively younger age groups. Table 4 reproduces data from the Public Health Service report. The table provides estimates of the number of persons in each age group who will at any time during their lives become cigarette smokers, indicated in the table as "future lifetime (maximum)." For example, data for men indicate that for the group 65 and over at the time of the survey, the future lifetime percentage of persons becoming regular cigarette smokers was 33.7 percent, but for men 25 to 34 at the time of the survey the equivalent percentage was 71.3 percent. For women, the future lifetime estimate is equal to 4.6 percent for those 65 and over at the time of the survey but 47.8 percent for women 25 to 34 years of age at the time of the survey. These rates make no allowance for persons who discontinue smoking after becoming regular smokers. The report notes, however, that "* * * discontinuance of smoking is not an important factor before age 35." (Id., at 17.)

Data in table 4 also provide detailed information as to the age at which persons begin regular cigarette smoking. It indicates, for example, that among males 25 to 34 as of February 1955, 61.4 percent had started regular smoking prior to age 21. Among females 25 to 34 at the time of the survey, 28.9 percent had started smoking prior to age 21. For females 18 to 24 at the time of the survey, 32.6 percent had begun regular smoking prior to the age of 21. These data indicate that the prevalence of smoking by persons under 21 years of age is of sufficient magnitude to warrant consideration of the effects of advertising on such persons.

2. *Changes in type and brand preference.* Table 5 provides data for the period 1952 to 1963 on cigarette preference by type. It indicates that "* * * there has been a continuous decline since 1952 in the proportion of cigarette output accounted for by regular cigarettes and an uninterrupted increase in the proportion of total output accounted for by filter and menthol cigarettes." (Bureau Report 34.) Data in table 5 are also presented in charts 1 and 2.

In 1952, the market shares of regular, filter, and menthol cigarettes were 77.6, 1.3 and 2.9 percent, respectively.[25] By 1963, the market shares for regular, filter, and menthol cigarettes were 21.5, 43.0 and 16.3 percent, respectively. The combined filter and menthol cigarette share, which had been 4.2 percent in 1952, had increased to 59.3 percent by 1963. Inasmuch as more than 95 percent of menthol output in 1963 consisted of menthol filter-kings and no menthol-filter cigarettes were manufactured in 1952, it may also be said that the market share of filter cigarettes had increased from 1.3 percent in 1952 to about 59 percent in 1963.

[25] Note that in this report, as in the Bureau Report, the terms "output," "sales," "domestic consumption," and "consumption" are used interchangeably. All series, however, exclude exports or production for exports. This usage has been necessary because of limitations as to data available. Differences in the series are minor and do not significantly affect data on relative shares or trends.

TABLE 4—CUMULATIVE PERCENTAGE OF PERSONS BECOMING REGULAR CIGARETTE SMOKERS PRIOR TO AGE SPECIFIED, BY AGE AND SEX, UNITED STATES, 1955

Age started smoking	Age at time of survey (years)					
	18–24 [1]	25–34 [1]	35–44	45–54	55–64	65 and over
	CIGARETTES (MEN)					
10	0.9	0.5	0.7	0.9	0.9	0.7
11	1.4	.9	1.3	1.8	1.7	1.1
12	1.5	1.0	1.7	1.9	2.0	1.3
13	2.4	2.1	2.9	3.2	3.0	2.1
14	3.5	3.3	3.9	3.9	3.6	2.8
15	6.3	6.5	7.1	6.6	6.2	4.3
16	11.6	12.4	13.0	11.7	10.9	7.5
17	23.3	24.7	23.8	20.2	17.3	10.7
18	33.5	35.3	31.5	27.3	21.6	13.0
19	44.3	50.0	45.7	39.5	31.8	16.6
20	48.9	55.2	49.8	42.8	34.0	17.3
21	52.6	61.4	56.9	51.2	41.2	20.9
22	54.2	64.1	60.6	55.2	44.3	22.2
23	55.3	65.5	62.5	56.7	45.7	22.9
24	55.8	66.4	63.4	57.7	46.2	23.2
25	------	67.0	64.0	58.2	46.9	23.4
26	------	67.4	65.3	60.1	48.7	25.1
27	------	67.6	65.8	60.4	49.1	25.6
28	------	67.7	66.0	60.6	49.5	25.7
29	------	67.9	66.4	61.1	50.0	26.0
30	------	67.9	66.4	61.3	50.2	26.1
31	------	68.2	66.9	62.2	51.2	27.5
32	------	68.2	67.0	62.3	51.2	27.8
33	------	68.4	67.1	62.5	51.2	28.0
34	------	68.4	67.2	62.6	51.5	28.0
35	------	68.4	67.3	62.7	51.6	28.1
Future lifetime (maximum)	------	71.3	70.7	66.3	56.5	33.7
Age started smoking	Age at time of survey (years)					
	18–24 [1]	25–34 [1]	35–44	45–54	55–64	65 and over
	CIGARETTES (WOMEN)					
10	0.1	0.1	------	------	0.1	------
11	.2	.2	0.1	0.1	.2	------
12	.2	.2	.1	.1	.2	------
13	.3	.4	.2	.1	.2	------
14	.9	.6	.3	.2	.2	0.1
15	2.1	1.5	.6	.3	.3	.1
16	4.8	3.2	1.7	.6	.6	.2
17	9.8	7.0	4.2	1.3	.7	.4
18	15.9	11.9	7.0	2.0	.8	.4
19	24.3	20.2	12.3	4.1	1.2	.6
20	28.9	23.9	14.5	4.7	1.4	.7
21	32.6	28.9	19.6	7.5	2.1	.9
22	34.7	31.9	22.0	8.7	2.3	1.0
23	35.8	34.0	23.4	9.7	2.4	1.0
24	36.2	35.3	24.8	10.3	2.6	1.1
25	------	36.2	25.6	10.9	2.8	1.1
26	------	37.6	28.0	13.4	3.4	1.4
27	------	38.0	28.9	13.7	3.6	1.4
28	------	38.7	29.6	14.4	3.7	1.4
29	------	39.3	30.5	14.7	4.0	1.4
30	------	39.8	30.8	14.9	4.1	1.4
31	------	40.3	32.6	17.0	5.5	1.6
32	------	40.7	32.7	17.3	5.6	1.7
33	------	40.9	33.2	17.8	5.9	1.7
34	------	41.2	33.4	18.2	5.9	1.7
35	------	42.0	33.8	18.5	6.1	1.7
Future lifetime (maximum)	------	47.8	40.5	26.7	12.6	4.6

[1] For ages under 35, adjusted by usual actuarial procedures to take account of population not exposed to risk for entire age span covered.

SOURCE: William Haenszell, Michael B. Shimkin, and Herman P. Miller, Tobacco Smoking Patterns in the United States, Public Health Monograph No. 45, Government Printing Office, Washington, D.C., 1956, p. 56.

TABLE 5—CIGARETTE OUTPUT BY TYPE OF CIGARETTE: 1952 TO 1963

[All figures are in billions of cigarettes]

Year [1]	All types, total	Regular cigarettes	King-size [2] cigarettes	Filter [2] cigarettes	Menthol [3] cigarettes
1963	509.0	109.3	97.7	218.9	83.1
1962	494.5	118.8	97.0	205.4	73.4
1961	488.1	127.4	98.3	193.8	68.6
1960	475.4	130.3	91.9	192.4	60.9
1959	455.8	135.1	87.0	182.7	51.0
1958	436.1	142.8	87.6	168.6	37.1
1957	409.0	155.0	84.7	142.8	26.6
1956	391.0	172.6	92.7	109.5	16.3
1955	380.0	193.6	90.0	74.7	12.7
1954	369.0	216.2	103.3	37.4	12.1
1953	388.0	259.8	103.9	12.4	11.5
1952	395.8	307.2	71.9	5.2	11.5
	PERCENT DISTRIBUTION				
1963	100.0	21.5	19.2	43.0	16.3
1962	100.0	24.0	19.6	41.5	14.8
1961	100.0	26.1	20.1	39.7	14.1
1960	100.0	27.4	19.3	40.5	12.8
1959	100.0	29.6	19.1	40.1	11.2
1958	100.0	32.7	20.1	38.7	8.5
1957	100.0	37.9	20.7	34.9	6.5
1956	100.0	44.1	23.7	28.0	4.2
1955	100.0	50.9	26.1	19.7	3.3
1954	100.0	58.6	28.1	10.1	3.3
1953	100.0	67.0	26.8	3.2	3.0
1952	100.0	77.6	18.2	1.3	2.9

[1] For years prior to 1961, totals consist of tax-paid removals for domestic consumption as reported to the Internal Revenue Service plus additions to inventory and minus reductions in inventory. These figures do not include tax-free removals or exports. The pre-1961 totals, therefore, will differ slightly from those shown in table 1. For 1961, 1962, and 1963, totals are equal to the Internal Revenue Service series on tax-paid withdrawals for domestic consumption and are approximately equivalent to domestic sales.

[2] King-size, filter cigarettes are classified as filter cigarettes.

[3] This classification includes all cigarettes made with menthol. In 1963, more than 95 percent of menthol output consisted of menthol-filter-kings. The balance consisted of regular-size menthol cigarettes.

SOURCES: Printers' Ink, Dec. 22, 1961, pp. 24–25, Dec. 27, 1957, p. 23, Dec. 23, 1960, pp. 28–29, Dec. 28, 1956, p. 26, Dec. 25, 1959, p. 21, Dec. 30, 1955, p. 13, Dec. 26, 1958, p. 23, and Jan. 15, 1954, p. 36.

SOURCE: Bureau Report, table 20, p. 35.

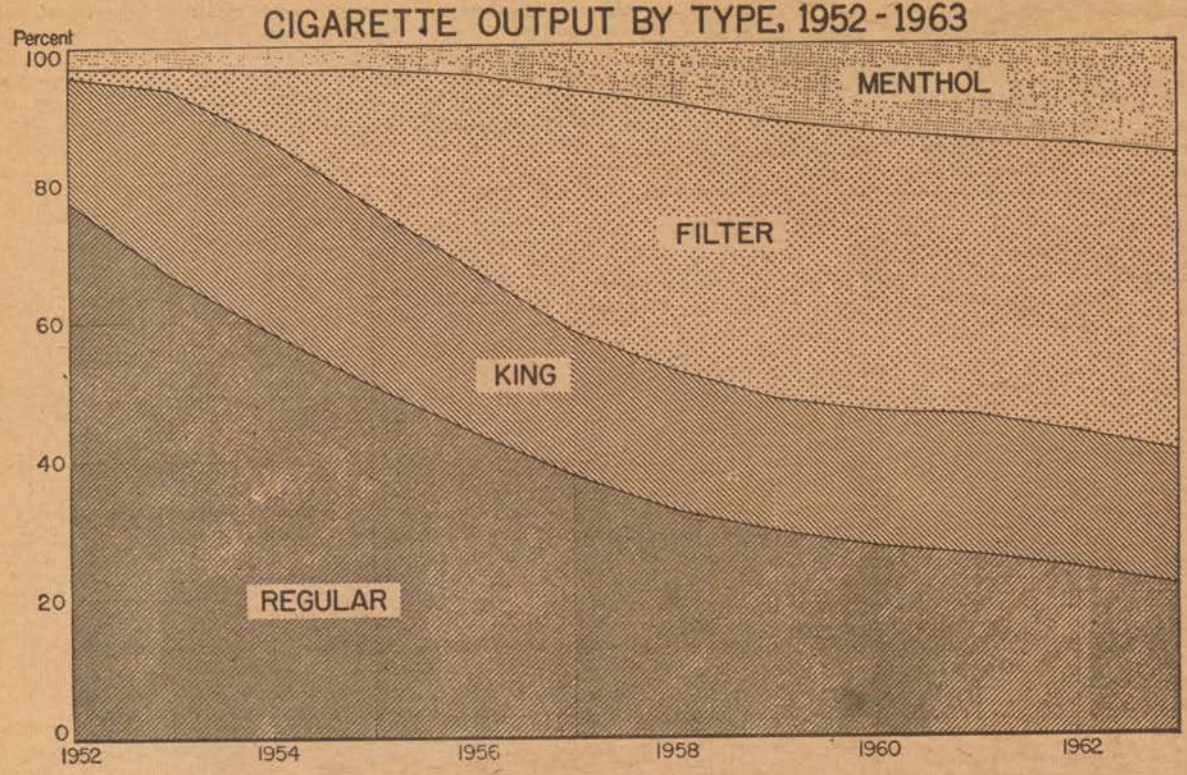

Chart 1

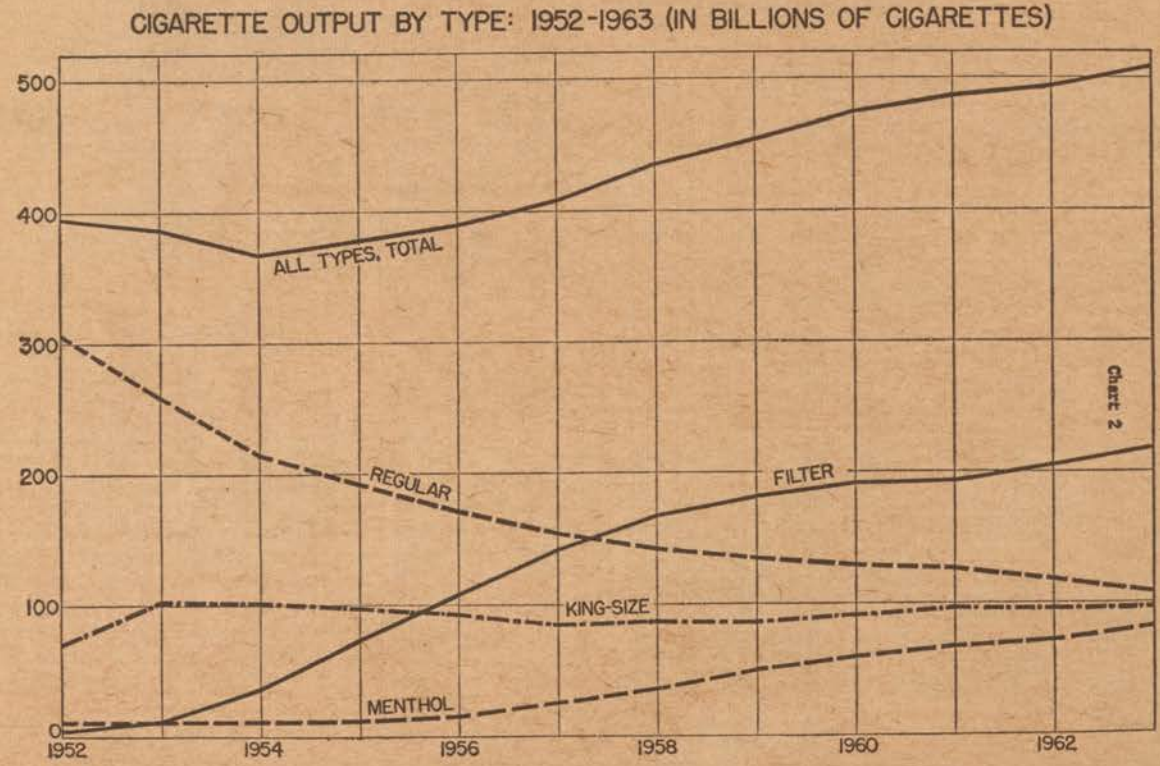

Chart 2

In absolute terms, the data also show a continuous decline in the output of regular cigarettes and substantial increases in the output of filter and menthol cigarettes. Regular cigarette output equaled 307.2 billion units in 1952. By 1963, this total had declined to 109.3 billion units, or by 64.4 percent. Greater percentage changes, however, occurred in the output totals for filter and menthol cigarettes. Filter output in 1952 equaled 5.2 billion units; by 1963, the filter total had reached 218.9 billion units. This change represented an increase of more than 4,000 percent. Large percentage increases in filter output were recorded during each of the years of the period 1953 to 1958; smaller gains were achieved thereafter.

Although menthol cigarette output recorded a substantial increase during the period 1952 to 1963, it was not until 1956, with the introduction of light-menthol, filter-king cigarettes such as Salem, that menthol cigarettes achieved significant gains. Further gains also occurred in years subsequent to 1956. In 1952, menthol cigarette output equaled 11.5 billion units. The bulk of this output, moreover, consisted of heavy-menthol, non-filter Kool cigarettes. By 1963 menthol cigarette output equaled 83.1 billion units, and more than 80 percent

of this total consisted of light-menthol brands, such as Salem, Belair, Alpine and Newport, which had been introduced subsequent to 1955.

Changes in individual brand preference have paralleled the increased popularity of filter and menthol-filter cigarettes. Tables 6 and 7 provide market share and rank data for the 30 leading cigarette brands of 1963 for the entire period 1950 to 1963. As shown in tables 6 and 7, all of the six leading brands of cigarettes in 1950, except Pall Mall, were regular cigarettes. Pall Mall, a king-size cigarette, ranked fifth in 1950 and accounted for 6.1 percent of the total output. By 1963, Pall Mall ranked first and only two of the leading six cigarette brands were regular cigarettes. The latter, Camel and Lucky Strike, ranked third and sixth, respectively. Two filter brands, Winston and Kent, ranked second and fifth, respectively, and a menthol-filter-king cigarette, Salem, ranked fourth. By 1963, therefore, leadership among cigarette brands was no longer held by regular cigarettes.

TABLE 6.—PERCENTAGE OF TOTAL OUTPUT DURING EACH OF THE YEARS 1950 TO 1963 FOR THE 30 LEADING CIGARETTE BRANDS OF 1963

Brand	Type [1]	Company	1963	1962	1961	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950
All brands, total.			100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Pall Mall	K	American Tobacco	14.3	14.6	14.5	14.0	13.7	13.3	13.3	14.3	14.6	14.1	12.1	10.7	8.1	6.1
Winston	F	R. J. Reynolds	13.6	12.9	12.0	11.0	10.1	9.7	9.8	8.7	5.8	2.0				
Camel	R	do	11.8	12.9	13.5	13.9	14.3	14.6	15.7	17.8	19.6	22.0	25.3	26.5	26.6	26.3
Salem	M	do	8.8	8.9	8.4	7.4	6.2	4.4	2.9	1.0						
Kent	F	P. Lorillard	7.3	7.4	7.2	8.0	8.2	8.3	3.7	.9	.7	1.1	.8	.1		
Lucky Strike	R	American Tobacco	7.1	8.0	8.4	8.9	9.6	10.8	12.7	14.2	15.1	15.9	16.8	18.6	20.4	22.9
L & M	F	Liggett & Myers	5.4	5.3	5.3	5.2	5.5	6.0	6.4	5.2	3.3	1.8	.3			
Marlboro	F	Philip Morris	5.0	5.0	4.9	4.6	4.5	4.7	4.8	3.7	1.7					
Viceroy	F	Brown & Williamson	3.7	3.6	3.7	4.5	4.7	5.1	5.9	6.0	5.3	4.0	1.5	.7	.4	.3
Kool	M	do	3.1	3.0	2.9	3.1	3.0	3.1	3.1	3.0	3.3	3.3	2.9	2.9	2.5	2.3
Tareyton	F	American Tobacco	2.5	2.3	2.2	2.0	1.7	.9	.8	.9	.9	.4				
Chesterfield	K	Liggett & Myers	2.1	2.2	2.5	2.6	2.5	2.5	2.5	3.3	3.7	3.7	3.5	2.1		
Parliament	F	Philip Morris	2.0	2.0	1.9	1.9	2.0	1.6	.5	.5	.5	.6	.6	.4	.2	.3
Raleigh	F	Brown & Williamson	1.9	1.6	1.4	1.2	1.1									
Newport	M	P. Lorillard	1.7	1.7	1.5	1.1	1.1	.6	.2							
Chesterfield	R	Liggett & Myers	1.7	2.0	2.7	3.1	3.6	4.3	5.3	6.3	8.6	10.7	12.8	14.8	17.1	18.1
Old Gold	F	P. Lorillard	1.0	1.0	1.0	1.1	1.1	1.3	1.6	1.5	1.3	.1				
Belair	M	Brown & Williamson	.9	.5	.1	.2										
Philip Morris	K	Philip Morris	.8	.8	.8	.8	.8	1.0	1.2	1.4	1.8	2.2	2.3			
Raleigh	K	Brown & Williamson	.7	.7	.7	.7	.7	1.7	1.5	1.8	1.9	2.0	1.5			
Philip Morris	R	Philip Morris	.6	.8	.9	1.2	1.4	1.8	2.4	3.5	4.3	5.7	6.6	9.1	10.2	10.7
Tareyton	K	American Tobacco	.5	.5	.5	.6	.7	.8	1.0	1.4	2.0	3.0	3.4	3.2	2.4	1.8
Alpine	M	Philip Morris	.5	.5	.5	.5	.2									
Montclair	M	American Tobacco	.5	.1												
Paxton	M	Philip Morris	.4													
Lark	F	Liggett & Myers	.3													
Spring	M	P. Lorillard	.3	.2	.2	.1	.2									
York	K	do	.2	.2	.2											
Old Gold	K	do	.2	.2	.3	.3	.3	.4	.5	.8	1.1	1.2	1.0			
Do	R	do	.2	.2	.4	.3	.7	1.2	1.7	2.3	3.3	4.1	5.1	5.9	5.3	5.1
All others			.9	.9	1.4	1.7	2.1	1.9	2.5	1.5	1.2	2.1	3.5	5.0	6.8	6.1

[1] R=regular, K=king size, F=filter, and M=menthol.

SOURCE: *Printers' Ink*, Feb. 14, 1964, p. 26-27; Dec. 22, 1961, pp. 24-25; Dec. 23, 1960, pp. 28-29; Dec. 25, 1959, p. 21; Dec. 26, 1958, p. 23; Dec. 27, 1957, p. 23; Dec. 28, 1956, p. 26; Dec. 30, 1955, p. 13; Jan. 15, 1954, p. 36; and Oct. 23, 1953, p. 440.
SOURCE: Bureau Report, table 23, p. 40.

TABLE 7.—RANK OF THE 30 LEADING CIGARETTE BRANDS OF 1963 DURING EACH OF THE YEARS 1950 TO 1963

Brand	Type[1]	Company	1963	1962	9161	1960	1959	1958	1957	1956	1955	1954	1953	1952	1951	1950
Pall Mall	K	American Tobacco	1	1	1	1	2	2	2	2	3	3	4	4	5	5
Winston	F	R. J. Reynolds	2	2	3	3	3	4	4	4	5	12				
Camel	R	do	3	2	2	2	1	1	1	1	1	1	1	1	1	1
Salem	M	do	4	4	4	6	6	9	11	17						
Kent	F	P. Lorillard	5	6	6	5	5	5	9	19	19	16	15	22		
Lucky Strike	R	American Tobacco	6	5	4	4	4	3	3	3	2	2	2	2	2	2
L & M	F	Liggett & Myers	7	7	7	7	7	6	5	7	11	14	21			
Marlboro	F	Philip Morris	8	8	8	8	9	8	8	8	15					
Viceroy	F	Brown & Williamson	9	9	9	9	8	7	6	6	6	7	12	12	13	14
Kool	M	do	10	10	10	10	11	11	10	11	9	9	9	8	7	7
Tareyton	F	American Tobacco	11	11	13	13	14	19	20	18	18	19				
Chesterfield	K	Liggett & Myers	12	12	12	12	12	12	12	10	8	8	7	9		
Parliament	F	Philip Morris	13	13	14	14	13	15	22	22	21	18	17	13	14	16
Raleigh	F	Brown & Williamson	14	16	16	15	17									
Newport	M	P. Lorillard	15	15	15	17	17	22	23							
Chesterfield	R	Liggett & Myers	15	13	11	11	10	10	7	5	4	4	3	3	3	3
Old Gold	F	P. Lorillard	17	17	17	18	16	16	15	14	16	23				
Belair	M	Brown & Williamson	18	23	27	27										
Philip Morris	K	Philip Morris	19	18	19	19	19	18	17	15	14	11	10			
Raleigh	K	Brown & Williamson	20	20	20	20	20	14	16	13	13	13	11			
Philip Morris	R	Philip Morris	21	19	18	16	15	13	13	9	7	5	5	5	4	4
Tareyton	K	American Tobacco	22	21	21	21	22	20	18	16	12	10	8	7	8	9
Alpine	M	Philip Morris	22	21	22	22	27									
Montclair	M	American Tobacco	23	34												
Paxton	M	Philip Morris	25													
Lark	F	Liggett & Myers	26													
Spring	M	P. Lorillard	26	27	26	35	27									
York	K	do	28	24	35											
Old Gold	K	do	28	24	24	25	26	23	21	20	17	15	13			
Do	R	do	28	24	23	24	21	17	14	12	10	6	6	6	6	6

[1] R=regular, K=king-size, F=filter, and M=menthol.

SOURCES: *Printers' Ink*, Feb. 14, 1964, pp. 26-27; Dec. 22, 1961, pp. 24-25; Dec. 23, 1960, pp. 28-29; Dec. 25, 1959, p. 21; Dec. 26, 1958, p. 23; Dec. 27, 1957, p. 23; Dec. 28, 1956, p. 26; Dec. 30, 1955, p. 13; Jan. 15, 1954, p. 36; and Oct. 23, 1953, p. 440.
SOURCE: Bureau Report, table 24, p. 40.

TABLE 8—RELATIVE IMPORTANCE DURING 1963 OF FILTER AND MENTHOL-FILTER BRANDS INTRODUCED AFTER JAN. 1, 1952

Brand	Domestic consumption during 1963 (billions of cigarettes)	Percent distribution
All brands, total	509.6	100.0
Filter brands introduced after Jan. 1, 1952, total	187.7	36.8
Winston	69.4	13.6
Kent	37.1	7.3
L & M	27.2	5.3
Marlboro[1]	25.4	5.0
Dual Filter Tareyton	12.5	2.5
Raleigh (filter only)	9.4	1.8
Old Gold (filter only)	5.1	1.0
Lark	1.6	.3
Menthol-filter brands introduced after Jan. 1, 1952, total	79.5	15.8
Salem	44.8	8.8
Kool (filter only)	13.0	2.6
Newport	9.0	1.8
Belair	4.8	.9
Alpine	2.3	.5
Montclair	2.3	.5
Paxton	2.0	.4
Spring	1.3	.3
All other brands	242.4	47.4

[1] Included because Marlboro was in effect reintroduced after 1952.

SOURCE: *Printers' Ink*, Feb. 14, 1964.

Also of significance is the fact that, by 1963, the cigarette market was increasingly dominated by filter and menthol-filter brands that had been introduced since 1952. As indicated by table 8, such brands accounted for more than half of total consumption in 1963. These data indicate the active role cigarette manufacturers have played in marketing filter and menthol-filter cigarettes; they tend to negate any inference that a spontaneous shift by consumers to filter and menthol-filter brands already on the market took place.

The dramatic character of the changes in brand preference since 1950 may be more fully appreciated if it is recalled that during the years prior to 1950, three brands of regular cigarettes, Lucky Strike, Camel and Chesterfield, dominated the cigarette market. In 1925, 1935 and 1950 these brands had accounted for 82, 85, and 67.9 percent, respectively, of total cigarette output. By 1963, however, the share of output accounted for by the three brands had declined to 20.6 percent and two of the three brands no longer ranked among the top three. (Bureau Report 35.)

3. *Cigarette advertising expenditures.* As noted earlier, advertising expenditure data for the leading six cigarette manufacturers are available from both trade sources and the Internal Revenue Service. As shown in table 9, Internal Revenue Service data indicate that advertising expenditures increased from $84.8 million in 1950 to $236.4 million in 1960, or by 178.7 percent. Cumulative totals of Internal Revenue Service data for the period 1950 to 1960 indicate that the six leading cigarette manufacturers incurred advertising expenditures of approximately $1.75 billion.

Trade data in table 9 indicate that estimated expenditures for television, newspapers (including Sunday supplements), and general magazines increased from $49.1 million in 1952 to $153.9 million in 1962, or by 213.2 percent. Cumulative totals for the period 1952 to 1962 indicate that the six leading cigarette manufacturers spent an estimated $1.2 billion in the included media. These totals do not include spot television expenditures for the years 1952 to 1955 and therefore tend to overstate the increase in the three media total for the period 1952 to 1962. It is estimated, however, that spot television expenditures were not of major significance to the three media total for 1952. Media not included for all of the period 1952 to 1962 consist principally of radio, outdoor advertising, farm and business publications, direct mail promotions, point-of-sale advertising, premiums, and sample promotions. It is estimated, however, that the data shown from trade sources in table 9 account for more than half of total advertising expenditures. It should be pointed out that the trade data shown consist of estimates based upon gross time and space charges, computed on a one-time basis; that is, the figures do not reflect deductions for cash or frequency discounts. In addition, the figures do not include an allowance for preparation costs on print media or production costs on broadcast media. It is believed, however, that the trade data in table 9 are reasonable approximations of actual expenditures in the included media.

TABLE 9—ADVERTISING EXPENDITURES OF THE 6 LEADING CIGARETTE MANUFACTURERS: 1950 TO 1962

Year	Advertising expenditures in selected media of 6 leading cigarette manufacturers[1] ($1,000)	Advertising expenditures of 6 leading tobacco products manufacturing corporations (Internal Revenue Service data)[2] ($1,000)
1963	NA	NA
1962	153,872	NA
1961	150,630	NA
1960	153,484	236,414
1959	152,881	232,634
1958	137,276	217,883
1957	119,946	203,256
1956	104,493	177,197
1955	71,515	148,189
1954	66,488	131,666
1953	60,076	121,455
1952	49,136	NA
1951	NA	96,987
1950	NA	84,814

[1] From table 10 below. Includes advertising expenditures for network and spot television, general magazines, and newspapers (including Sunday sections). Spot television not included for the period 1952 to 1955.
[2] Bureau Report, p. 3.

NA=Not available.

Historical data from trade sources are available which indicate trends in media use during the period 1952 to 1963. Table 10 provides separate data on the advertising expenditures of the six leading cigarette manufacturers in television, general magazines, and newspapers (including Sunday supplements). It indicates that between 1952 and 1962, expenditures for network television, general magazines, and newspapers increased respectively by 256, 129, and 45 percent. It also indicates that during 1962, combined expenditures for network and spot television accounted for 71 percent of the three media total. By 1962, network television advertising expenditures were estimated to equal $81.9 million, an amount approximately three times both spot television or general magazine expenditures and more than four times expenditures for newspaper advertising.

As described in the Bureau of Economics Report,

> Data are also available for other media but not for all of the years of the period 1952 to 1962. As described in footnote 1 of * * * [Table 10], published estimates indicate that about $19 million was spent by the six cigarette manufacturers for network radio during 1962, and $1.7 million for outdoor advertising. If these totals are added to the 1962 total of $153.9 million appearing in table 10, the computed total for the advertising expenditures of the six companies would be $174.9 million. This total, of course, does not include such media as spot radio, direct mail, point of sale advertising aids, premiums, and sampling. It is estimated, however, that the computed total of $174.9 million accounts for 65 to 75 percent of total advertising expenditures by the six companies. [Bureau Report 29.]

Comparisons between cigarette consumption and cigarette advertising expenditures indicate that during recent years increases in advertising expenditures have considerably exceeded increases in cigarette consumption. Comparisons for the period 1950 to 1960 indicate that total cigarette consumption increased by 30.5 percent and that per capita consumption of persons 18 years of age and older increased by 18.5 percent, but that advertising expenditures reported to the Internal Revenue Service by the six leading cigarette manufacturers increased by 178.7 percent. Similarly, a comparison of cigarette consumption data and advertising expenditure data from trade sources indicates that there was a 25.8 percent increase between 1956 and 1962 in total domestic cigarette consumption, a 16.9 percent increase in per capita cigarette consumption, but a 47.3 percent increase in the advertising expenditures of the six leading cigarette manufacturers for television, general magazines, and newspapers.

TABLE 10.—ADVERTISING EXPENDITURES BY LEADING 6 CIGARETTE MANUFACTURERS IN SELECTED MEDIA: 1952 TO 1963

(ALL FIGURES ARE IN THOUSANDS OF DOLLARS. TABLE INCLUDES DATA FOR R. J. REYNOLDS, AMERICAN TOBACCO CO., P. LORILLARD, BROWN & WILLIAMSON, PHILIP MORRIS, AND LIGGETT & MYERS)

Year	Selected media total [1]	Television total	Network TV	Spot TV	General magazines	Newspapers (including Sunday sections)
1963	NA	125,322	89,253	36,069	31,834	NA
1962	153,872	109,105	81,947	27,158	27,029	17,738
1961	150,630	104,300	77,750	26,550	25,645	20,685
1960	153,484	100,260	68,119	32,141	[2] 23,881	29,343
1959	152,881	96,459	67,973	24,486	[2] 21,619	34,803
1958	137,276	88,592	61,078	27,514	20,872	27,812
1957	119,946	78,599	47,337	31,262	18,032	23,315
1956	104,493	66,864	38,497	28,367	14,965	22,664
1955	71,515	*40,240	40,240	NA	15,349	15,926
1954	66,488	*39,885	39,885	NA	14,125	12,478
1953	60,076	*32,554	32,554	NA	12,235	15,287
1952	49,136	*25,083	25,083	NA	11,810	12,243

[1] Expenditure data in this table consist of gross time and space costs computed at 1-time rates. There is no deduction for cash or frequency discounts. These totals do not include preparation costs for print media and talent and production costs for broadcast media. (*Printers' Ink*, Sept. 6, 1963, p. 21.)

Data for network radio and outdoor media are also available, but are not available for all of the years of the period 1952 to 1962 and for this reason have not been included in the main table. Data for network radio are available for the years 1952 to 1955, and appear below. An estimate for network radio for 1962 was published in *Printers' Ink*, Sept. 6, 1963, and is also included below. Data for outdoor media for 1958, 1961, and 1962 are also shown below.

Year	Network radio ($1,000)	Outdoor advertising ($1,000)
1962	19,300	1,699
1961	NA	1,328
1958	NA	2,879
1955	9,743	NA
1954	10,779	NA
1953	14,960	NA
1952	15,522	NA

[2] Data for Brown and Williamson's expenditures in general magazines were not available in published sources but have been estimated and included in the 1959 and 1960 totals.

NA=Not available.

*Does not include expenditures for spot television.

SOURCES: *Printers' Ink*, Oct. 21, 1955, p. 76 ff; Oct. 31, 1958, p. 59 ff; Sept. 1, 1961, p. 368 ff; Sept. 6, 1963, p. 21 ff; Bureau Report, table 18, p. 28; *Advertising Age*, Apr. 6, 1954, p. 94 and Apr. 13, 1964, p. 101.

If the most striking development in cigarette consumption patterns since 1952 has been the increased popularity of filter and menthol-filter brands, equally striking has been the absolute and relative increase in advertising expenditures for filter and menthol-filter cigarettes. Table 11 presents data on advertising expenditures in selected media. It indicates that the advertising expenditure share for filter and menthol cigarettes (primarily menthol-filter) increased from 3.7 percent in 1952 to 66.1 percent in 1962. In absolute terms, expenditures in selected media increased from $2.1 million in 1952 to $96.5 million in 1962. Since more than 95 percent of menthol cigarette output in 1962 consisted of menthol-filter cigarettes and since no such cigarettes were produced in 1952, it can also be estimated that the combined advertising expenditure total for filter and menthol-filter cigarettes increased from $1.6 million in 1952 to $95.6 million in 1962, and, on a percentage share basis, from 2.8 percent in 1952 to 65.5 percent in 1962.

Between 1952 and 1962, filter and menthol cigarette consumption increased from 16.7 billion units in 1952 to 278.8 billion units in 1962, or by 261.1 billion units. About 40 percent of this increase represented a net increase in total cigarette consumption. In 1952, advertising expenditures in selected media for filter cigarettes equaled $1.6 million; by 1962, the total for filter cigarettes in selected media equaled $68.4 million. This change represents an increase of more than 4,000 percent. In 1955, expenditures for menthol cigarettes did not exceed $1 million. By 1962, spending to advertise menthol cigarettes, primarily menthol-filter cigarettes, exceeded $28 million. The change for menthol cigarettes also represents an increase of more than 4,000 percent.

It cannot be demonstrated that the intensive advertising of filter and menthol-filter cigarettes was exclusively responsible for the net increase in total cigarette consumption of about 100 billion units during the years 1952 to 1962 and the gross increase in menthol and filter output of 262 billion units in that period, but it is highly probable that advertising contributed significantly to both increases, particularly to the increase in filter and menthol-filter consumption. It is of course true that the spending of even millions of dollars will not guarantee success for a particular brand or ensure retention of a market for a given type of cigarette. The decline in recent years of most brands of regular cigarettes, and the conspicuous failure of some filter brands, such as Hit Parade, support this view. No cigarette, however, has been able to attain significant sales success without heavy promotional expenditures. The increased share of output accounted for by filter and menthol-filter cigarettes is undoubtedly associated with the mounting evidence throughout the 1950's of the health hazards of smoking but there is considerable probability that cigarette advertising since 1952 has significantly contributed to the shift to filter and menthol-filter cigarettes.

C. Cigarette advertising: Its audience and content. 1. *The Audience for Cigarette Advertising.* The precise degree to which individuals in the United States are exposed to cigarette advertising cannot be accurately estimated from available data. The variety of media used by cigarette manufacturers and the magnitude of their expenditures indicate, however, that cigarette advertising reaches virtually all Americans who can either read, or understand the spoken word. Cigarettes are advertised on both network and spot television, on radio, in magazines and newspapers, in outdoor media, and by means of many types of point-of-sale advertising aids. So pervasive is cigarette advertising that it is virtually impossible for Americans of almost any age to avoid cigarette advertising. For example, the morning radio news broadcasts are often preceded or followed by a spot announcement for a cigarette brand. Outdoor billboards, trains, and buses carry advertising visible to both children and adults on their way to work or school. Restaurants and drug stores often have advertising decals for cigarettes on entrance doors and a variety of other display material such as wall clocks and change counter mats. Many of the daytime and evening television programs are sponsored by cigarette manufacturers; and numerous magazines and newspapers read by the whole family contain cigarette advertising. Theater and athletic-event programs often contain cigarette advertising.

TABLE 11—CIGARETTE ADVERTISING EXPENDITURES IN SELECTED MEDIA BY TYPE OF CIGARETTE: 1952 TO 1962 (ALL FIGURES ARE IN THOUSANDS OF DOLLARS)

Year [1]	Expenditures in selected media, total [2]	Regular cigarettes	King-size cigarettes [3]	Filter cigarettes [3]	Menthol cigarettes [4]
1962	145,986	20,154	29,373	68,434	28,025
1961	143,256	20,736	21,166	69,110	32,244
1960	143,910	21,929	19,948	70,216	31,817
1959	147,768	21,990	19,808	77,183	28,787
1958	134,985	21,388	20,095	69,280	24,222
1957	117,686	22,780	15,464	66,097	13,345
1956	105,334	29,101	21,962	46,738	7,533
1955	76,703	28,155	21,486	26,465	597
1954	70,457	39,041	16,746	13,796	874
1953	71,934	55,898	10,983	4,662	391
1952	56,673	47,564	7,013	1,603	493
PERCENT DISTRIBUTION					
1962	100.0	13.8	20.1	46.9	19.2
1961	100.0	14.5	14.8	48.2	22.5
1960	100.0	15.2	13.9	48.8	22.1
1959	100.0	14.9	13.4	52.2	19.5
1958	100.0	15.8	14.9	51.3	17.9
1957	100.0	19.4	13.1	56.2	11.3
1956	100.0	27.6	20.8	44.4	7.2
1955	100.0	36.7	28.0	34.5	.8
1954	100.0	55.4	23.8	19.6	1.2
1953	100.0	77.7	15.3	6.5	.5
1952	100.0	83.9	12.4	2.8	.9

[1] Data for 1954 to 1962: In the case of brands selling more than 1 type of cigarette under a single brand name, it was necessary to allocate expenditures on the basis of brand sales by type of cigarette. This method probably understates the actual expenditures for nonregular cigarettes.

Data for 1952 and 1953: For these years, data were not available to make such allocations. As a result, negligible amounts of expenditures for Chesterfield, Old Gold, and Philip Morris king-size cigarettes were included in the totals for regular cigarettes; also, for the same years, negligible amounts of expenditures for Tareyton filter cigarettes were included in the totals for king-size cigarettes.

[2] Included media: Data in this table include expenditures for the entire period 1952 to 1962 for the following media: General magazines, newspapers (including Sunday sections), and network television. Expenditures for radio are not included subsequent to July 31, 1955. Outdoor advertising expenditures are not included prior to 1955. Spot television expenditures are not included prior to 1956.

Included brands: Figures in this table do not include expenditures for any brand which in all of the years 1952 to 1962 had sales of less than 1 billion cigarettes. Also not included are expenditures for any brand which declined in sales below 1 billion units, except that expenditures are included for such brands for all years in which their sales equalled 1 billion or more and all years prior to the most recent year in which sales equalled 1 billion or more. These exclusions, however, are not considered significant because they generally amount to less than 2 percent of total output.

Basis for data: Figures consist of space and time costs computed on a single-time basis. There is no allowance for preparation costs for print media or for talent or production costs for broadcast media. There is also no deduction for frequency or cash discounts.

[3] Filter-king cigarettes are classified as filter cigarettes.

[4] All menthol cigarettes, regardless of size and regardless of whether they were made with a filter, are classified as menthol cigarettes.

SOURCES: *Advertising Age*, June 23, 1958, p. 68; July 27, 1959, p. 82; Sept. 19, 1960, p. 126; Aug. 7, 1961, p. 82; June 25, 1962, p. 30; Sept. 2, 1963, p. 38.

SOURCE: Bureau Report, table 21, p. 37.

In subpart B, supra, data were presented on advertising expenditures by media. It was indicated that during 1963 the six leading cigarette manufacturers spent approximately $89.3 million for network television advertising. These expenditures were greater than those for any other media. Appendix B of the Bureau of Economics Report presents audience data for network television programs sponsored in whole or in part by cigarette manufacturers.[39] Data in Appendix B indicate that substantial numbers of persons of all ages are exposed to cigarette advertising. Table 12 contains audience estimates for persons 18 years of age and older for 55 network television programs sponsored in whole or in part by cigarette manufacturers. As shown in table 12, 25 of these programs had audiences of such persons equal to 15.0 million or more. The most popular program, the "Beverly Hillbillies," had an audience of this age group estimated at 30.9 million. Bureau of Census data indicate that as of November 1, 1963, the resident United States population 18 years of age and over equaled 120.3 million; it may be estimated, therefore, that this particular television program reached an audience equal to approximately 25 percent of all persons 18 years of age and over. It may similarly be calculated that each of the 25 programs with an audience equal to 15.0 million or more of persons 18 years of age and older exposed at least 12 percent of such persons to cigarette advertising. The totals shown in table 12 represent minimums since programs broadcast five days a week (Monday through Friday) have been counted as a single program. In addition, it must be emphasized, these data do not include spot television advertising. During 1963, the six leading cigarette manufacturers spent approximately $36.1 million for such advertising (Advertising Age, April 13, 1964, p. 101), an amount equal to 40 percent of their expenditures for network television advertising.

[39] These data were compiled from the publication United States Television Audience, November 1963. The latter, a publication of the American Research Bureau, a subsidiary of C.E.I.R., was made available to the Commission and is an attachment to Ex. C. Its data are based upon a sample survey conducted by the American Research Bureau during the period November 6–19, 1963. Sponsorship information was obtained from listings in Advertising Age. Tables 12, 13, and 14 of this report summarize audience data in Appendix B.

TABLE 12—NETWORK TELEVISION PROGRAMS SPONSORED BY CIGARETTE MANUFACTURERS, DISTRIBUTED BY SIZE OF AUDIENCE 18 YEARS OF AGE AND OLDER: NOV. 6–19, 1963

	Number of programs
Selected programs, total	55
Programs with audience 18 years of age and older equal to—	
30.0 million or more	1
25.0 to 29.9 million	0
20.0 to 24.9 million	5
15.0 to 19.9 million	19
10.0 to 14.9 million	18
5.0 to 9.9 million	5
Less than 5.0 million	7

Table 13 summarizes audience data for persons 13 to 17 years of age (referred to as "teens" in Appendix B). Table 13 indicates that 23 of the 55 programs sponsored in whole or in part by cigarette manufacturers had a teen-age audience in excess of 2.0 million. Since Bureau of the Census data indicate that as of November 1, 1963, the total resident United States population in ages 13 through 17 equaled 17.2 million, it may be estimated that each of these programs reached an estimated minimum of about 12 percent of the total United States population of ages 13 to 17. One program, the "Beverly Hillbillies," had a teen-age audience equal to 6.5 million, or almost 40 percent of such persons.

TABLE 13—NETWORK TELEVISION PROGRAMS SPONSORED BY CIGARETTE MANUFACTURERS DISTRIBUTED BY SIZE OF AUDIENCE 13 THROUGH 17 YEARS OF AGE: NOV. 6–19, 1963

	Number of programs
All programs, total	55
Programs with audience of persons 13 to 17 years of age equal to—	
4.0 million or more	3
3.0 to 3.9 million	4
2.0 to 2.9 million	16
1.0 to 1.9 million	19
0.5 to 0.9 million	8
Less than 0.5 million	5

Data in Appendix B also indicate that substantial numbers of children between 2 and 12 years of age are exposed to cigarette advertising on network television. As shown in table 14, 29 of the 55 network television programs sponsored by cigarette manufacturers had total audience of children of ages 2 to 12 equal to 2.5 million or more. On the basis of a Census Bureau population estimate for the age group of 43.7 million, this would mean that each of these programs reached a minimum of 5 percent of the children of such ages. One program, "The Beverly Hillbillies," had an audience of children 2 to 12 equal to 12.6 million, or about 28.8 percent of the children in the United States of that age group.

Because cigarette advertising is often carried simultaneously by more than one network, the totals in tables 12, 13 and 14 understate the probable total number of persons exposed to cigarette advertising during a single time period. For example, on Wednesday evening between 9 and 10 p.m. (e.s.t.) both the CBS and ABC networks carry programs sponsored in whole or in part by cigarette manufacturers. On the basis of data in Appendix B, the combined audience during this time period includes an esti-

mated 45.8 million persons 18 years of age and older, 7.9 million persons between 13 and 17 years of age, and 11.4 million children between 2 and 12. This equals approximately 38 percent of the United States population of age 18 and over, 46 percent of the population of ages 13 to 17, and 26 percent of the population of ages 2 to 12.

TABLE 14—NETWORK TELEVISION PROGRAMS SPONSORED BY CIGARETTE MANUFACTURERS, DISTRIBUTED BY SIZE OF AUDIENCE 2 TO 12 YEARS OF AGE: NOV. 6–19, 1963

	Number of programs
Selected programs, total	55
Programs with audience 2 to 12 years of age equal to—	
10.0 million or more	1
7.5 to 9.9 million	4
5.0 to 7.4 million	5
2.5 to 4.9 million	19
1.0 to 2.4 million	17
Less than 1.0 million	9

Table 15 provides additional information on the teen-age audience for cigarette advertising. It distributes evening-hour programs sponsored by cigarette manufacturers by the day of the week and time period.[40] Table 15 indicates that the bulk of the evening programs sponsored in whole or in part by cigarette manufacturers were scheduled for broadcast during time periods ending prior to 9 p.m. (e.s.t.). As shown in table 15, 22 of the 40 evening-hour programs with an audience in excess of 1.0 million persons of ages 13 to 17 were telecast prior to 9 p.m. An additional 11 programs were telecast between 9 and 10 p.m. The balance, or 7 programs, were telecast between 10 and 11 p.m. It may be noted that the 7 programs broadcast after 10 p.m. had relatively smaller teen-age audiences.

TABLE 15—EVENING HOUR NETWORK TELEVISION PROGRAMS SPONSORED BY CIGARETTE MANUFACTURERS DISTRIBUTED BY SIZE OF AUDIENCE 13 TO 17 YEARS OF AGE, DAY OF WEEK AND TIME PERIOD

[DOES NOT INCLUDE PROGRAMS WITH AN AUDIENCE OF LESS THAN 1.0 MILLION]

Day of week and time period [1]	Size of audience age 13–17				
	Total	1.0 to 1.9 million	2.0 to 2.9 million	3.0 to 3.9 million	4.0 million or more
Selected programs, total	40	18	15	4	3
Programs telecast—					
Sunday through Thursday:					
Between 6 and 7:30 p.m.					
Between 7:30 and 9 p.m.	15	4	7	3	1
Between 9 and 10 p.m.	7	3	2	0	2
Between 10 and 11 p.m.	4	4			
Friday:					
Between 6 and 7:30 p.m.					
Between 7:30 and 9 p.m.	3	2	1		
Between 9 and 10 p.m.	2	1	1		
Between 10 and 11 p.m.	2	1	1		
Saturday:					
Between 6 and 7:30 p.m.					
Between 7:30 and 9 p.m.	4	1	3		
Between 9 and 10 p.m.	2	1		1	
Between 10 and 11 p.m.	1	1			

[1] Programs telecast 5 days a week, Monday through Friday, have been included only once and have been tabulated in the "Sunday through Thursday" group. Programs which extend beyond the time intervals specified are included in the earliest applicable time. For example, Monday Night at the Movies (7:30 to 9:30) is included with the 7:30 to 9:00 programs. Times shown are in e.s.t.

SOURCE: Bureau Report, app. B.

Data for other media would similarly indicate exposure of teenagers and younger children to cigarette advertising. Short of the most drastic restrictions on media use, there is no way to prevent persons under 21 or 18 years of age from being exposed to cigarette advertising. Given the fact, found by the Surgeon General's Advisory Committee, that "all available knowledge points toward the years from the early teens to the age of 20 as a significant period during which a majority of later smokers began to develop the active habit" (ACR 368), the kind of advertising to which young persons are exposed is obviously important.

2. *Themes and appeals in current cigarette advertising which portray the desirability of smoking.* The Commission has examined the large number of representative advertisements summarized in the Bureau of Economics Report and made a part of the record of this proceeding, and other cigarette advertising. Our examination of cigarette advertising indicates that two elements predominate: one, portrayal of the desirability of smoking; and two, assurance about the safety of cigarettes or relative safety of the advertised brand. The basis for the first of these conclusions will be described in this section; the basis for the second conclusion will be described in the following section.

Fundamental to the question of whether the portrayal of the desirability of smoking is a dominant element of current advertising is the question whether there can be any cigarette advertising that does not directly or indirectly portray the desirability of smoking. Since there is no way to consume a cigarette without smoking it, it might be argued that all cigarette advertising is, in some degree, a portrayal of the desirability of smoking. By this reasoning, even premium offers such as those now being made for Raleigh, Belair and Alpine cigarettes would constitute a portrayal of the desirability of smoking. These offers, however, are not directly related to the experience of smoking. Direct portrayal of the desirability of the smoking experience is, in any event, sufficiently prevalent that there is no need to rely on examples of indirect portrayal in order to demonstrate that portrayal of the desirability of smoking is a dominant element in current cigarette advertising, i.e., advertising appearing since January 1, 1963.[41]

The direct portrayal of the desirability of smoking is largely accomplished in the following two ways: (a) by describing the satisfactions derived from smoking; and (b) by associating smoking with individuals, groups, or ideas worthy of emulation or likely to be emulated. Our view that current cigarette advertising portrays the desirability of smoking does not imply that we doubt that smoking affords pleasure, enjoyment, and other satisfactions to many individuals. Neither do we doubt that smoking is a habit enjoyed by many individuals worthy of emulation. However, for reasons that will appear, the character of current cigarette advertising is relevant to the questions involved in this proceeding. Sections (a) and (b) which follow describe in detail the portrayal in current advertising of the desirability of smoking.

(a) *Descriptions in current advertising of the satisfactions to be derived from smoking.* A review of current advertising indicates that virtually every cigarette brand makes one or more claims respecting the satisfactions to be derived from smoking. Examples of such claims are reproduced in table 16. The Pall Mall slogan, "Pall Mall travels pleasure to you," illustrates the theme of pleasure in current cigarette advertising. We take it as obvious that when an advertisement describes a product as affording pleasure, the advertisement is portraying the desirability of using that product. There is, of course, no way to obtain pleasure from a Pall Mall without smoking it. Pall Mall is not alone in its use of the word "pleasure." Winston offers a cigarette that is "packed for pleasure"; Kent promises "more real smoking pleasure"; and Camel advertising suggests that "Camel time is pleasure time."

Taste and flavor are also prominent features of current advertising. Pall Mall reminds smokers that, "it's so good to your taste." Camel promises "clean cut taste," and Kent is claimed to have "a taste to give you more real smoking pleasure." Filter cigarettes, such as Marlboro and Viceroy, emphasize "richer flavor" and "the taste that's right" respectively. Dual Filter Tareyton is claimed to have "a fine tobacco taste that makes Tareyton smokers so aggressively loyal," and Parliament is claimed to be a cigarette that "* * * lets you enjoy true, rich tobacco flavor * * *"

[40] It should be noted that all times specified are Eastern Standard Time. This would mean that viewing time in the Central Time Zone would generally be one hour earlier. Hours of television broadcasting in the Pacific Time Zone are generally identical to those of the Eastern Time Zone. Not included in table 15 are programs with a teen-age audience of fewer than 1 million. The few programs which are not contained in the time intervals specified in the stub of the table have been included in the earliest applicable time period. For example, "Monday Night at the Movies," a program broadcast between 7:30–9:30 p.m. (e.s.t.), has been included with the 7:30 to 9 p.m. programs.

[41] As indicated by the advertising summaries contained in the analysis sheets of Appendix A of the Bureau of Economics' Report, the portrayal of the desirability of smoking has consistently been a prominent characteristic of cigarette advertising. Appendix A contains extensive excerpts from the cigarette advertising of the period 1950 to March 1, 1964, and a limited number of excerpts from earlier advertising.

TABLE 16—THE PORTRAYAL IN CURRENT ADVERTISING OF THE SATISFACTIONS TO BE OBTAINED FROM SMOKING

Brand	Type	Sales rank during 1963	Excerpts from advertising	Date	Source [1]
Pall Mall	King-size	1	Pall Mall travels pleasure to you	Jan. 1964	Vol. I, p. 40.
			Pall Mall's *Natural Mildness* is so good to your taste! So smooth, so satisfying so darnright smokable! For flavor and enjoyment you just can't beat Pall Mall's natural mildness. It's so good to your taste . . . Enjoy satisfying flavor.	Sept. 1963	Vol. I, p. 35.
Winston	Filter	2	[T]his is the filter cigarette that's packed for pleasure.	Jan. 3, 1963	Vol. I, pp. 68, 69.
			. . . [M]ore people find it fun to smoke Winston than any other cigarette, because Winston tastes good like a cigarette should.		
Camel	Regular	3	Camel Time is a pleasure time—honest enjoyment—clean cut taste . . . You make any moment a little bit brighter—the minute you light a Camel cigarette. . . .	1964	Vol. I, p. 2.
Salem	Menthol	4	Salem softness refreshes your taste . . . Salem gives you . . . rich tobacco taste, smoothed with menthol—softened with fresh air.	Nov. 8, 1963	Vol. I, p. 139.
Kent	Filter	5	Kent has the filter *and* the taste to give you more real smoking pleasure . . . Kent satisfies *best.*	Sept. 23, 1963	Vol. I, p. 70.
			When you light up a cigarette . . . it's for real satisfying pleasure. And may I say, you get more of that satisfying pleasure . . . when you smoke Kent.	Sept. 27, 1963	Vol. I, p. 75.
			Here is smoking at its very best! Just the way smoking should be satisfying and pleasant.		
Lucky Strike	Regular	6	Taste fine tobacco at its best. Smoke a Lucky Strike . . . the taste that millions like.	February 1964	App. D.
			Smoking is a pleasure meant for adults. And Lucky Strike's fine tobaccos are blended for adult tastes.	Fall 1963	Vol. I, p. 14.
L&M	Filter	7	You get more body in the blend, more flavor in the smoke, more taste through the filter.	August 1963	Vol. I, pp. 81, 82.
Marlboro	do	8	There's richer flavor in this one from the richer breed of tobaccos . . . you get a lot to like with a Marlboro.	do	Vol. I, p. 84.
Chesterfield	Regular, King-size.	9	Today's Chesterfield King . . . pure pleasure all the way . . . tastes great.	July 1963	Vol. I, p. 56.
			They satisfy!	May 8, 1964	App. D.
Viceroy	Filter	10	Viceroy's got the taste that's right	Dec. 30, 1963	Vol. I, p. 94.
Kool	Menthol	11	Kool's Menthol Magic brightens taste, refreshing all day through, feel extra coolness in your throat . . .	Mar. 15, 1963	Vol. I, p. 145.
Herbert Tareyton.	Filter, King	12	Get . . . the fine tobacco taste that makes Tareyton smokers so aggressively loyal.	Dec. 11, 1963	Vol I, p. 109.
Raleigh	do	13	Everyday, more and more people are discovering the extra pleasure of smoking Raleigh cigarettes . . . Raleighs have a real TOBACCO taste.	Oct. 9, 1963	Vol. I, p. 117.
Parliament	Filter	14	Parliament lets you enjoy true, rich tobacco flavor.	Jan. 22, 1964	App. D.
Newport	Menthol	15	Newport . . . the most refreshing smoke of all! Newport has . . . a blend of great-tasting tobaccos. Newport refreshes while you smoke, makes the flavor fresher.	June 28, 1963	Vol. I, p. 154.
Philip Morris	Regular, King	16			
Old Gold	Filter, King	17	Old Gold spin filters. Best taste yet in a filter cigarette!	Nov. 9, 1963	Vol. I, p. 121.
Belair	Menthol	18	Clean and fresh as all outdoors—that's the pleasure you get in the clean fresh taste of Belair.	October 1963	Vol. I, p. 158.
Alpine	do	19	What's it like to smoke an Alpine: Well, it's like many fresh little things you enjoy. It's like the breeze through the willows at the waters edge—or the way the air feels at dawn . . . a bright, invigorating taste. . . .	Jan. 10, 1963	Vol. I, p. 165.
Montclair	do	20	You'll taste the difference, the delicious difference with your very first puff . . . Discover for yourself how good good tobacco can taste when the menthol's in the filter. . . .	October 1963	Vol. I, p. 172.

[1] Sources consist of app. vol. I of Bureau of Economics, A Report on Cigarette Advertising and Output and app. D

Menthol cigarette advertising is notable for its stress on "refreshment." Salem, for example, claims that "Salem softness refreshes your taste," while Kool claims that its menthol magic is refreshing all day through. Another menthol cigarette, Newport, promises "the most refreshing smoke of all."

As is evident from the above-quoted examples from regular, king, filter, and menthol cigarette advertising, and from other examples in table 16, current cigarette advertising is replete with descriptions of the satisfactions to be derived from smoking. These descriptions are both explicit and varied. Their constant repetition in advertising which reaches vast numbers of Americans of all ages must be viewed as significantly contributing to the portrayal of the desirability of smoking.

(b) *Association of smoking with ideas, individuals, and groups worthy of emulation or likely to be emulated.* If a pervasive feature of current cigarette advertising is description of the satisfactions to be derived from smoking, an equally important aspect of current advertising is the association of smoking with individuals, groups and ideas worthy of emulation or likely to be emulated. Our review of current advertising indicates that such associations are characteristic of the advertising of virtually every significant brand of cigarettes. For example, current advertising prominently associates smoking with romance, fun, and recreational activities; it features endorsements by actors, singers, military personnel, and individuals engaged in occupations such as boat designing and real estate development. Current advertising makes extensive use of young and attractive male and female models; and it urges smokers to follow the lead of knowing persons who prefer a particular brand. Even if all advertisements which depict couples in romantic surroundings enjoying the pleasures of cigarette smoking do not necessarily imply that smoking is essential to romance and good looks, such advertising plainly suggests that cigarette smoking is a desirable, attractive and rewarding activity.

Associations in current advertising between smoking and individuals and ideas worthy of emulation or likely to be emulated are numerous and varied. Examples of such associations are described below in detail for the principal brands.

Pall Mall—Sales rank in 1963: 1. Recent Pall Mall advertising associates smoking with glamour or romance by the use of attractive female models (see Bureau Report, Appendix, Volume I, pp. 35, 38, 39, 41). The smoking of Pall Mall cigarettes is also depicted in a convivial situation in which six persons are engaged in group singing (Volume I, p. 40).

Camel—Sales rank in 1963: 2. Recent Camel advertising has contained endorsements by individuals described as follows: (1) Bill Bunton, Underwater Research Specialist, expert SCUBA diver, Camel smoker (Volume I, p. 4); (2) Russell Youngblood, Balloon Club of America, Jet Pilot, Captain U.S.A.F. He'd walk a mile for a Camel (Volume I, p. 5); and (3) Ray Buckner, Chief Petty Officer, Polar Navigation Specialist, U.S. Coast Guard (Volume I, p. 8).

Winston—Sales rank in 1963: 3. Recent Winston television advertising has depicted couples at a hobby shop and a golf driving range. In another television commercial, a couple is depicted having fun in the snow with a small boy. (See Appendix D, infra.[41a])

Salem—Sales rank in 1963: 4. Salem advertising portrays young couples in a variety of romantic, outdoor settings (Volume I, pp. 138, 139, and 141).

Kent—Sales rank in 1963: 5. Kent advertising depicts the smoking of Kent cigarettes in both romantic and sophisticated-romantic situations. The advertising also portrays widespread use of Kent cigarettes by individuals in a variety of occupations (Volume I, pp. 74, 75 and 77).

[41a] Appendix D filed as part of original document.

L&M—Sales rank in 1963: 7. Recent L&M advertising associates the smoking of L&M with "good times." A magazine illustration similarly depicts hunters enjoying L&M, "When a cigarette means a lot" (Volume I, pp. 80, 81).

Marlboro—Sales rank in 1963: 8. Marlboro advertising is currently most notable for its association of Marlboro with a rather heroic conception of the cowboy. (See Appendix D, infra.) Marlboro advertising has also featured romantic settings, as illustrated by the following excerpt from a television script:

1. Open on: Downshot of a convertible in beautiful big tree country. At night, with full moon . . . .

2. Cut to: Shot taken through the windshield of the car as it speeds down a country lane lined with trees.

* * * * *

5. Dissolve to: Downshot of car as it pulls off road at edge of woods. We see Julie [London] and her escort in a beautiful sports convertible. [Volume I, p. 91.]

Chesterfield (Regular and King-Size)—Sales rank in 1963: 9. Recent Chesterfield advertising has depicted male Chesterfield smokers engaged in such activities as mountain climbing, dune buggy racing, and bicycle racing (Volume I, pp. 53, 54, 58). In these advertisements, a romantic element was also present. Chesterfield advertising has also featured personal endorsements by the actor, Gary Merrill, and by persons engaged in such occupations as costume design, real estate development, and boat design (Volume I, pp. 53, 54, 55, 58; also Appendix D, infra).

Viceroy—Sales rank in 1963: 10. Recent Viceroy advertising has depicted couples smoking Viceroy cigarettes at a football game and a ski lodge (Volume I, pp. 93, 94). Viceroy television advertising has also featured skits such as the following:

(1) Owner of dude ranch is offered Viceroy cigarette by female guest. He explains that he subsequently adopted the cigarette and married the girl. [Appendix D, infra.]

(2) A man buying flowers for his wife on the occasion of their wedding anniversary describes his adoption of Viceroy cigarettes as a result of the florist's suggestion. [Volume I, p. 96.]

3. *Themes and appeals in the current advertising of filter and menthol-filter cigarettes which tend to allay anxiety about the dangers of smoking.* Our examination of current advertising indicates that themes and appeals which allay anxiety about the dangers of smoking are most common in the advertising for filter and menthol-filter cigarettes. During 1963, filter and menthol-filter cigarettes respectively accounted for 43.0 and 15.8 percent of total consumption. Their combined share exceeded 58 percent of total consumption. The advertising discussed in this section, therefore, relates to types of cigarettes accounting for more than half of total 1963 consumption. In the 18 months since January 1, 1963, filter cigarette advertising has displayed divergent trends. The purpose of this section is to review the principal types of themes and appeals utilized in recent filter advertising, which have a tendency to allay the anxiety that might be felt by many in the advertising audience concerning the health hazards of cigarette smoking.

Any consideration of the advertising for filter cigarettes needs to be placed in the context of the history of filter cigarettes. Although the first of the filter cigarettes, Parliament, had been introduced as early as 1931, it was not until 1952 that the first of the "modern" filter cigarettes, Kent, was introduced, and it was not until after the evidence of the health hazards of cigarette smoking first became substantial and well-publicized in the early 1950's that sales of filter cigarettes increased. For example, in 1952, filter cigarettes accounted for approximately 1.3 percent of total output. In 1953, their share had increased to 3.2 percent. But in the following year, their share more than tripled and they accounted for 10.1 percent of total cigarette output. The substantial increase in filter cigarette consumption has strikingly paralleled the increasing concern over the health hazards of smoking.

Over the years, the themes and appeals used to promote filter cigarettes have varied in explicitness. Since the early 1950's, however, virtually no filter cigarette advertising has been free of assertions which seem intended to allay anxieties about the danger of smoking. Excerpts from filter advertising during the years 1957 to 1959 appear in table 17. These excerpts are representative of the "tar derby" era, and they suggest, in conjunction with the parallel, noted above, between filter consumption and concern with the hazards of smoking, that the mere addition of a filter to a cigarette is, in and of itself, some kind of claim or assurance relating to the health aspects of smoking. The purpose of the discussion which follows is to describe the ways in which current themes and appeals relating to filter cigarettes provide additional assurance about the health or safety of smoking cigarettes or the particular brand being advertised.

(a) *Winston advertising.* Current filter advertising considerably varies in the explicitness of, and the emphasis given to, themes and appeals which appear designed to allay anxiety about the dangers of smoking. Recent advertising for Winston illustrates some of this variation. This brand, it should be noted, has been the leading filter cigarette since 1955, and has ranked second among all brands since 1962. Much Winston advertising reminds the viewer or reader that Winston has a "pure white modern filter" and that Winston is "America's best-selling filter cigarette." (See, e.g., Bureau Report, Appendix, Vol. I, pp. 64–66, 68.) The phrase "modern filter," of course, says nothing explicitly about the efficacy of the filter; it could imply to many people, however, that the Winston filter is sufficiently "modern" to cope with any dangerous properties in cigarette smoke. The reasonableness of this interpretation is supported by the fact that most Winston advertisements do not anywhere explicitly state the purpose of the filter. Unlike so-called flavor-filter advertising, Winston advertisements do not claim that the filter is particularly useful in improving flavor. Indeed, a notable feature of Winston advertising is the stress on "filter blend," that is, "tobaccos specially selected and specially processed for filter smoking." An implication of these statements is that Winston provides good taste despite the inclusion of a filter that is "modern," i.e., effective.

TABLE 17.—EXAMPLES OF FILTER CLAIMS IN ADVERTISING DURING THE YEARS 1957 TO 1959

Brand	Excerpts from advertising	Date	Source [1]
Viceroy	Only Viceroy gives you filter-power of 20,000 filters.	October 1957	Vol. III, p. 73.
	The man who thinks for himself knows—only Viceroy has a thinking man's filter—a smoking man's taste!	Feb. 2, 1959	Vol. III, p. 77.
	Only Viceroy has it. The best filter of its kind ever developed. Does the finest filtering job in the world—for the finest taste.	Dec. 21, 1959	Vol. III, p. 96.
L & M	But puff by puff today's L & M gives you less tars and more taste.	Dec. 8, 1958	Vol. III, p. 97.
	L & M's patented filtering process electrostatically places extra filtering fibers crosswise to the stream of smoke—enabling today's L & M to give you—puff by puff—less tars in the smoke than ever before.	1958	Vol. III, p. 106.
Marlboro	Today's Marlboro—22 percent less tars, 34 percent less nicotine.	1959	Vol. III, p. 133.
	The Marlboro filter. Cellulose acetate is a modern effective filter material for cigarettes. This unretouched photo shows the cellulose acetate in just one Marlboro exclusive selectrate filter.	1958	Vol. III, p. 123.
Kent	Kent filters best. Of all leading filter cigarettes—you get less tar and nicotine in Kent. New exclusive micronite filter.	October 1959	Vol. III, p. 135.
	It makes good sense to smoke Kent—and good smoking, too!	1959	Vol. III, p. 144.
Old Gold filters	What's the most important single thing you smoke for? It's for the pleasure of good tobacco taste, isn't it? That's why Old Gold's new spin filter is making such a hit with so many thousands of smokers everyday. Because this new spin filter does more than reduce tar and nicotine—it actually improves smoking taste.	Jan. 28, 1959	Vol. III, p. 153.
Hit Parade	Only 1 cigarette can filter best! According to a new and superior method of testing for filtration—that cigarette is Hit Parade!	July 14, 1958	Vol. III, p. 161.
Parliament	The first filter cigarette in the world that meets the standards of U.S. Testing Company. New Hi-Fi Parliament. Proved: Over 30,000 traps—the most effective filtering material, millimeter for millimeter in a cigarette today. No other popular filter cigarette delivers less nicotine and tar. Proved: No other filter prevents leakage of tar and nicotine from filter to mouth. Only Parliament's filter is recessed, set deep down inside the mouthpiece where your lips can't touch it. Proved: New Hi-Fi filter—with exclusive recessed design—offers you the most complete filtering action in cigarette history. All the above filtering findings are certified true by the U.S. Testing Company, world's leading independent research laboratories.	Feb. 24, 1958	Vol. III, p. 182.

See footnotes at end of table.

TABLE 17—EXAMPLES OF FILTER CLAIMS IN ADVERTISING DURING THE YEARS 1957 TO 1959—Con.

Brand	Excerpts from advertising	Date	Source [1]
King Sano	Announcing new "soft smoke" King Sano. Reduces nicotine 50 percent—cuts tar 26 percent below any other cigarette—and that is the truth.	Sept. 1, 1958	Vol. III, p. 204.
Life	Unless you change to new Life—your filter cigarette no longer filters best. New Life with millecel filter filters best by far. Absorbs far more tar and nicotine that any other filter.	1959	Vol. III, p. 213.
Duke	Unlike others, Duke is king-sized in the filter, too, where it matters most—see? So, it's lowest in tar of all leading low-tar cigarettes.	1959	Vol. III, p. 214.
Spring	Tars and nicotine go down, down, down. In Spring, tars and nicotine are low, low, low—for 3 reasons: 1. New process of "air-conditioning"—for more complete combustion and burning. 2. Has extra filter action in the honeycomb filter. 3. A special blend of low tar and nicotine tobaccos.	Sept. 17, 1959	Vol. III, p. 250.
	The air-conditioned cigarette is lowest in tar, lowest in nicotine, lightest in menthol all menthol cigarettes.	1959	Vol. III, p. 251.

[1] Advertisements are contained in app. vol. III of Bureau of Economics, A Report on Cigarette Advertising and Output.

Winston advertising in February of 1964 took a considerably more explicit stand on the merits of its filter. (App. D, infra.) The advertisement first points out that "There is no need to shout. Winston speaks for itself. It is America's largest-selling filter cigarette, by far." The advertisement then goes on to ask, "What does Winston have that makes it a leader?" The advertisement attributes the success of Winston to three factors: one, a pure white, modern filter; two, filter-blend; and three, the fact that Winston has flavor—the best there is. The advertisement then asks "* * * If you are thinking of changing to a filter cigarette, consider this: People who know and enjoy filter smoking make Winston their overwhelming choice." It appears that the advertisement, taken as a whole, implies that Winston is a safe cigarette, or at least safer than its less popular competitors. First, the advertisement initially emphasizes a pure white, modern filter; this in itself seems to promise some health protection—else what significance has "pure," "white," or "modern"? Second, the advertisement's open-ended question, "If you are thinking of changing to a filter cigarette," further serves to bring to mind the health issue since a major reason for switching to filter cigarettes is, evidently, to minimize the health hazards in smoking. Third, the advertisement's statement that those "* * * who know * * * filter smoking make Winston their overwhelming choice" is in effect a claim that among persons knowledgeable about the health hazards of smoking and about the merits of all brands of filter cigarettes, Winston cigarettes are preferred to all others.

(b) *Lark advertising.* The Winston advertisement previously discussed represents a middle ground in filter and menthol-filter cigarette advertising. Both less and more explicit claims respecting the health or safety of cigarette smoking are to be found in filter and menthol-filter advertising. For example, the back of the Lark package contains the following information: "Lark contains two modern outer filters plus an inner filter of charcoal granules—a basic material science uses to purify air." "These granules, not only activated but specially fortified, filter smoke selectively to make Lark's fine tobaccos taste richly rewarding yet uncommonly smooth." (Bureau Report, Appendix, Vol. I, p. 133.) Despite the inclusion of a taste claim, these statements are subject to the interpretation that the purpose of including a filter of charcoal granules in the Lark cigarette is to purify the smoke and provide a safe cigarette. The Lark package also describes its filter as "unique in cigarette filtration." This usage of the word "unique" carries with it the implication that Lark is superior to any other cigarette in the capacity of its filter to provide a safe cigarette.

(c) *Marlboro and Viceroy advertising.* So-called "flavor filter" advertising is illustrated by recent Marlboro advertising, which contains statements such as "It comes to you plenty mild, too—through the exclusive Selectrate Filter" (Bureau Report, Appendix, Vol. I, p. 84), and "Good flavor smoothed by the exclusive Selectrate Filter." (App. D, infra.) These statements do not state that Marlboro cigarettes possess a filter capable of selecting out hazardous substances from cigarette smoke or that the filter, by virtue of its exclusiveness, makes Marlboro a cigarette safer than any other. Because of public concern about the health hazards of smoking, however, just such misinterpretations are extremely likely.

Viceroy advertising combines elements in Winston and Marlboro advertising. Its advertising claims that "Viceroy's got the Deep-Weave Filter * * * and the taste that's right!" (Bureau Report, Appendix, Vol. I, p. 95.) The syntax of this statement associates taste and filter but implies a separate usefulness to the filter apart from its ability, claimed elsewhere, to provide the taste that's right. The advertisement also suggests that Viceroy is superior to the other leading filter cigarettes because of its Deep-Weave Filter and the taste that's right. The wording of this advertisement conveys the impression that Viceroy is superior to any other filter cigarette in safety and that the "Deep-Weave Filter," because of the depth of its weave, is capable of barring entry into the mouth of the harmful ingredients of cigarette smoke.

(d) *Dual Filter Tareyton advertising.* One of the problems encountered in an analysis of current cigarette advertising is how to evaluate themes and appeals which, when literally interpreted, do not state that smoking is safe, but which nevertheless contain such an implication. For example, Dual Filter Tareyton advertising explains that "the white filter gives you the clean taste" and "the charcoal filter gives you the smooth taste." (Bureau Report, Appendix, Vol. I, p. 103.) If it were established that smoking involved no hazards to health, the adjectives "clean" and "smooth" might be accepted as descriptions of the intrinsic properties of the smoke. However, in the context of the tar and nicotine reduction claims made for filter cigarettes in the "tar derby" era and in the context of current medical knowledge and public concern for the health hazards of smoking, the adjectives "clean" and "smooth," when used to describe a filter cigarette, may imply to a cigarette smoker that because the advertised cigarette's smoke is neither unclean nor rough it is, therefore, free of hazards. This is particularly likely because, as mentioned earlier, the addition of a filter to a cigarette in and of itself may promise some reduction of health hazards to many consumers. Virtually any adjective, therefore, which ascribes improvement in the cigarette smoke to a filter may carry the implication that the cigarette is not a hazard to health or is less of a hazard to health than other brands or types of cigarettes.

(e) *Parliament advertising.* Parliament advertising provides a particularly good example of the combination of safety claims, flavor-filter claims, and what might be called the residuum of safety claims from earlier years. Typical Parliament television advertisements of early 1964 have portrayed such scenes as two men watching a girl water skiing, and a couple on a sailing yacht. The advertisements ask the question, "If you like things neat and clean—you will like Parliament." The advertisements then explain that "tobacco tastes best when the filter's recessed. Smoke neat—smoke clean—smoke Parliament. Parliament lets you enjoy true, rich, tobacco flavor because the filter's recessed a neat, clean ¼ inch away. That's Parliament's extra margin. Neat, clean smoking, and plenty of flavor too." (Appendix D, infra.)

The words "neat and clean" constitute the central message of this advertising. Both advertisements, in fact, include the words "neat and clean" in their titles. One advertisement is entitled "Water Skiing—Neat, Clean"; the other is entitled "Neat Clean Jacket." These recent Parliament advertisements also contain a flavor-filter claim which includes the words "neat and clean": "Parliament lets you enjoy true rich tobacco flavor because the filter's recessed a neat, clean ¼ inch away." At an earlier point, however, each advertisement contains the phrase "Smoke neat—smoke clean." This phrase conveys the implication that the smoke of a Parliament cigarette is neat and clean and, therefore, not a hazard to health.

Other claims frequently made in current Parliament advertising relate to its recessed filter and extra margin. These are contained in the following

statements: "Parliament lets you enjoy true, rich tobacco flavor because the filter's recessed a neat clean ¼ inch away. That's Parliament's extra margin." These statements might be viewed as simply a description of the recessed filter, but in view of earlier Parliament advertising it would appear that promises of safety are inherent in any Parliament claim relating to a recessed filter and extra margin. During 1958, as shown in table 17, supra, a different explanation was made by Parliament of the benefits of a recessed filter:

Proved: No other filter prevents leakage of tar and nicotine from filter to mouth. Only Parliament's filter is recessed, set deep down inside the mouthpiece where your lips can't touch it.

Prior to 1964, a different explanation was also offered by Parliament of the phrase "extra margin." In 1963, for example, Parliament cigarettes were advertised in television commercials entitled "Parachute" and "Hockey Headguard." (Bureau Report, Appendix, Vol. I, pp. 112, 115.) The "Parachute" advertisement began as follows:

Picture—open on close ups of parachute jumper as he clings to the side of the plane, ready to jump. Cut as he lets go and falls away from the plane in spread-eagle position. Cut to jumper as he maneuvers his body toward the target on the ground. He pulls his ripcord to release his parachute. Cut to close up of parachute as it billows open. Wipe to jumper on the ground as he gathers in the lines of his chute. Cut to him as he pats his emergency chute which is still packed and slung on his chest. An announcer then observes "this man knows the value of an extra margin—in the extra chute he carries—in the cigarette he smokes." The advertisement then goes on to explain that "every Parliament gives you—extra margin: extra margin—because—Parliament puts the filter where it does you the most good—recessed a neat clean quarter inch away—extra margin—because—tobacco tastes best when the filter is recessed." This advertisement conveys the impression that Parliament provides the cigarette smoker with an extra safety margin. Although Parliament advertising no longer provides such dramatic illustration of the value of extra margin, the phrase "extra margin" may still imply that Parliament is a safe cigarette, particularly to those who may recall the earlier advertising and who may in their minds insert the word "safety" between the words "Extra" and "Margin."

TABLE 18—FILTER CLAIMS IN MENTHOL—FILTER ADVERTISING

Brand	Excerpt from advertising	Date	Source
Salem	Modern filter	Nov. 8, 1963	Vol. I, p. 139.
Kool	Pure white filter	Mar. 15, 1963	Vol. I, p. 146.
Newport	Only Newport has a fine white filter	June 28, 1963	Vol. I, p. 154.
Montclair	Montclair gives you activated charcoal in a Unique Compound Filter. Only Montclair filters in freshness—filters in flavor the whole smoke through.	November, December 1963	Vol. I, p. 170.
Paxton	. . . New team of filters back-to-back. Filter No. 1 is fortified with PECTON. Actually controls moisture to freshen the flavor with every puff. Filter No. 2 keeps Paxton's rich flavor good and mild.	1963	Vol. I, p. 175.
Spring	Spring's longer filter smooths the taste	Oct. 16, 1963	Vol. I, p. 183.

(f) *Menthol-Filter advertising.* Advertising for menthol-filter cigarettes, as might be expected, contains a number of appeals identical to those characteristic of filter advertising. Table 18 contains examples of such appeals. As shown in that table, Salem, Kool, and Newport cigarettes are each described as having white filters; Spring, however, is advertised as provided with a larger filter and Paxton with a team of filters. Finally, Montclair cigarettes are described as having a unique compound filter of activated charcoal.

Menthol-filter advertising also presents appeals based upon the specific menthol properties of these cigarettes. Some of these appeals seem intended to convert cigarettes into a "refreshment," and to transport the smoker into a world so well insulated from any suggestion of health hazards that the effect is to assure the smoker that smoking is safe.

Advertising for Salem cigarettes, the leading menthol-filter brand and the fourth-ranked brand among all brands, is illustrative of important characteristics of current menthol-filter advertising. Salem cigarette advertising is most notable for its portrayal of couples in romantic, outdoor settings. (Bureau Report, Appendix, Vol. I, pp. 137–42.) Both the settings and the models are attractive. Both reader and viewer of Salem advertising are invited to "step into the wonderful world of Salem cigarettes." A television commercial explains that "there is a wonderful world of softness" and a "wonderful world of freshness" which is the world of Salem cigarettes. Such advertising may be viewed as relating exclusively to the intransic properties of Salem cigarettes. Such advertising, however, also has the effect of creating for Salem cigarettes a world in which it is impossible to conceive of health hazards having any role.

Kool, one of the earliest of the menthol brands and one which has been marketed for more than thirty years, now ranks second among the menthol-filters. Kool, however, unlike light-menthol Salem and other newer brands of menthol cigarettes such as Newport, Belair and Alpine, is a heavy-menthol cigarette. In addition, Kool is manufactured both with and without a filter, although filter output now constitutes more than 75 percent of total Kool output. Advertising for Kool reflects its heavy-menthol properties. For example, Kool is proposed as the cigarette for the man who has smoked so many cigarettes during the day that he no longer is interested in cigarettes because, "They don't taste like much." (Id., Appendix, Vol. I, p. 148.) This appeal comes close to attributing therapeutic qualities to Kool cigarettes, insofar as Kool cigarettes are claimed to be capable of restoring one's physical ability to enjoy smoking. Kool advertising also contains appeals similar to those used by light-menthol brands. A Kool jingle claims that "Kool's menthol magic brightens taste, refreshing all day through * * *" (id., Appendix, Vol. I, p. 145).

Newport cigarette advertising, like Salem cigarette advertising relies heavily on the portrayal of romantic outdoor situations. (Id., Appendix, Vol. I, pp. 154–56.) Newport advertisements, for example, portray young couples having fun in or near the water. One television commercial is entitled "Walking in Surf"; another, "Man on Raft." These advertisements, like the earlier described Salem advertisements, depict smoking in an essentially pure environment, in a world effectively insulated from health hazards. Such advertising has a tendency to assure smokers that there is no hazard to health in smoking the advertised brand.

Advertising for Belair cigarettes, the third-ranking brand of light-menthol cigarettes, emphasizes: "clean and fresh as all outdoors—that's the pleasure you get in the clean fresh taste of Belair." (Id., Appendix, Vol. I, p. 158.) A careful reading of this language indicates, of course, that the phrase "clean and fresh as all outdoors" is literally a description of the pleasure derived from smoking Belair rather than a description of the cigarette smoke itself. (The latter would obviously mean that the smoking of Belair cigarettes is completely safe.) The net impression of Belair advertising is such, however, that it is quite likely that the statement will be understood as a claim that the smoke of Belair cigarettes is, indeed, "clean and fresh as all outdoors." Belair advertising, like that earlier described for Salem cigarettes, portrays couples in outdoor, romantic settings which are in fact "clean and fresh." The world of Belair cigarettes is thereby so far removed from health hazards that the advertising suggests that smoking Belair cigarettes cannot be a hazard to health.

Alpine, the fourth-ranking brand among light-menthol cigarettes, makes the following appeal: "What's it like to smoke an Alpine? Well, it's like many fresh, little things you enjoy. It's like the breeze through the willows at the water's edge or the way the air feels at dawn. That's what it's like to smoke an Alpine." (Id., Appendix, Vol. I, p. 165.) Language such as this, when combined with the portrayal of male and female models in outdoor settings of appropriate beauty, carries with it the implication that the smoke of an Alpine cigarette is as safe as exceptionally pure air at dawn. Alpine advertising also claims that "Alpine is completely different from the sort of smoking you may be used to. A bright, invigorating taste, pack after pack." The claim that Alpine taste is invigorating is not very far, in its net impression, from the claim that smoking (or smoking Alpine) is invigorating. Montclair, another brand of light-menthol cigarettes, makes the claim that "Only Montclair filters in freshness, filters in flavor the whole smoke through." (Id., Appendix, Vol. I, p. 169.)

4. *The impact of cigarette advertising on youth.* During 1963, Marlboro cigarettes presented an advertisement in college newspapers which consisted of a column written by the humorist, Max Shulman. (Bureau Report, Appendix, Vol. I, p. 85.) The Philip Morris Company conducted a contest for college students in which prizes could be won by saving empty packages of Marlboro, Parliament, Alpine, Philip Morris and Paxton cigarettes. Other brands have also extensively advertised in college newspapers and have engaged student representatives to give out samples and otherwise promote cigarettes. It was reported in Changing Times, December 1962, p. 34, that cigarette companies accounted for 40 percent of the national advertising appearing in college periodicals and that students hired as campus representatives to pass out free cigarette samples and organize contests were paid about $50.00 per month.

Endorsements by athletes have been a prominent part of the advertising of several cigarette brands. Camel advertising, for example, has featured a personal endorsement by the New York Yankee star Roger Maris. (Bureau Report, Appendix, Vol. II, p. 3.) The text of the advertisement explained that "These hands rewrote the records with a baseball bat. They are the hands of Roger Maris—the man who hit 61 home runs in 61. Roger smokes Camels. He likes 'em. Gets real enjoyment every time he lights up!" Lucky Strike advertising has featured the New York Giant football player, Frank Gifford. (Id., Appendix, Vol. II, p. 12.) A Lucky Strike advertisement showed a picture of Frank Gifford in action in 1957 and explained that in 1957 "the young New York Giant halfback was already a top star—and a Lucky Strike smoker." The advertisement also showed Frank Gifford today (1962) and commented that "now one of pro football's all-time greats, Frank's still a satisfied Lucky smoker." This advertisement at the very least implied that there was nothing inconsistent between smoking Lucky Strike for five years and becoming "one of pro football's all-time greats."

Cigarette companies have also sponsored numerous sports broadcasts and telecasts. Marlboro, during 1962, for example, sponsored National Football League television broadcasts. Its advertising featured an endorsement by Paul Hornung, Green Bay Packers halfback and 1961 National Football League Player of the Year. (Bureau Report, Appendix, Vol. II, p. 106.) Baseball players have similarly been featured in cigarette advertising.

It may also be noted that during earlier years, some cigarette advertising made use of youthful models. During 1957, for example, Winston ran an advertisement which depicted a college professor correcting a student couple in their use of the slogan "Winston tastes good like a cigarette should" (Bureau Report, Appendix, Vol. III, p. 55). Other advertisements during 1957 to 1959 also had male and female models quite young in appearance. (See, for example, id., Appendix, Vol. III, pp. 55, 105, 124, 137.) A student motif was also made use of by Spring cigarettes during late 1959. An advertisement for Spring stated that "Spring arrives on campus—all over America. Green, blue and white will be prominent colors on every campus this fall, regardless of the college colors. Because returning students are smoking Spring cigarettes, in the white pack with blue and green stripes" (id., Appendix, Vol. III, p. 250).

D. *The effects of cigarette advertising.* 1. *Cigarette consumption and advertising—A summary.* As described in the Bureau of Economics' Report, "During the 50 years since 1913, per capita consumption of cigarettes has increased from 164 cigarettes per year in 1913 to approximately 4,000 per year in 1963. During the same period, total domestic consumption has increased from an estimated 16 billion units to 509 billion units. In 1913, cigarettes accounted for 8.7 percent of the tobacco consumed by Americans. However, by * * * [1963] more than 80 percent of United States tobacco consumption was in the form of cigarettes. Manufacturers of cigarettes have increased advertising expenditures from an estimated $13.8 million in 1913 to more than $200 million in 1963." (Bureau Report 1; see Annual Report on Tobacco Statistics, 1963, p. 52.)

The years prior to 1950 were characterized by the dominance of three brands of regular cigarettes, Lucky Strike, Camel, and Chesterfield. In 1925 these brands accounted for 82 percent of total cigarette output; in 1935 the figure was 85 percent; and in 1950, 67.9 percent. The years since 1950, however, have been marked by their decline. By 1963, the share of output accounted for by the three brands had diminished to 20.6 percent and two of the three brands no longer ranked among the top three.

The years since 1950 have been notable principally for substantial increases in the output shares of filter and menthol-filter cigarettes. In 1952 no menthol-filter cigarettes were produced and the output share of filter cigarettes was 1.3 percent. By 1963, the combined total for filter and menthol-filter cigarettes was about 58 percent of total cigarette consumption. During the same period, the output share of regular cigarettes had declined from 77.6 percent to 21.5 percent.

The leading four brands of 1963 reflect these changes. Ranking first in 1963 with an output share of 14.3 percent was Pall Mall, a king-size cigarette. Second, with 13.6 percent, was Winston, a filter-king cigarette. Third, with 11.8 percent, was Camel, a regular-size cigarette. Fourth, with 8.8 percent, was Salem, a menthol-filter-king. Together these brands accounted for almost 50 percent of total 1963 output.

Internal Revenue Service data for the six leading cigarette manufacturers indicate that their advertising expenditures increased from $84.8 million in 1950 to $236.4 million in 1960, or by 178.7 percent. By comparison, during this same period, there were considerably smaller increases in total and per capita cigarette consumption. During these years, total cigarette consumption increased by 30.5 percent and per capita consumption by 17.0 percent.

Trade publication data for the period 1952 to 1962 indicate that during these eleven years, the six companies spent approximately $1.2 billion for television, general magazine, and newspaper advertising. Between 1952 and 1962, their advertising expenditures in the three media increased by approximately 200 percent. By comparison, total domestic cigarette consumption increased by 23.4 percent during this period.

Between 1952 and 1962 there also occurred a substantial shift in advertising expenditures from regular to filter and menthol-filter cigarettes. In 1952, 2.8 percent of advertising expenditures in selected media were accounted for by filter and menthol-filter cigarettes. By 1962, that figure had increased to 65.5 percent. For the period 1952 to 1962, spending by cigarette manufacturers to advertise filter and menthol-filter cigarettes was probably in excess of $1 billion. During this same period, the share of advertising expenditures accounted for by regular cigarettes declined from 83.9 percent to 13.8 percent.

In 1962, total advertising expenditures by the six leading cigarette manufacturers in television, general magazines, newspapers, network radio, and outdoor media were $175 million. For all media, it is estimated, their expenditures were in excess of $200 million. A major development in cigarette advertising during the period 1952 to 1963 has been the increase in the use of television. Annual expenditures for network television increased from $25 million in 1952 to $89 million in 1963, or by about 250 percent. By 1963, total spending for network and spot television equalled $125 million. Today, television is the principal medium for the advertising of cigarettes.

The portrayal of the desirability of smoking is a characteristic of virtually every significant brand of cigarette. In part, such portrayal is accomplished by describing the pleasures of smoking; for example, Pall Mall advertising claims that "Pall Mall travels pleasure to you." It is also accomplished by the association of smoking with ideas and individuals worthy of emulation or likely to be emulated, so as to suggest that smoking is an important attribute of full personal success and development. For example, current cigarette advertising prominently associates smoking with romance, contains endorsements by persons in prestigious occupations, and identifies smoking with a heroic conception of the cowboy. Our examination of the content of current cigarette advertising also indicates that claims or assurances related to health are prominent in the advertising of filter and menthol-filter brands. These claims and assurances vary in their explicitness, but they are sufficiently patent to compel the conclusion that much filter and menthol-filter advertising seeks to persuade smokers and potential smokers that smoking cigarettes is safe or not unhealthful, or that smoking the advertised brand is safer or less deleterious than smoking other brands or types of cigarettes.

2. *The effect of cigarette advertising upon total cigarette consumption.* No single factor probably accounts for the growth in cigarette consumption in recent years or for the variations in the rate of growth. There seems no doubt, however, that advertising has been important in the overall growth of the cigarette industry and is important today in determining total cigarette consumption and type and brand preference.

Professor Neil Borden of the Harvard Business School, in his classic study, The Economic Effects of Advertising (1942), observed that "Without advertising, cigarette use would probably have grown; with advertising, the increase has been amazing." (P. 228.) Professor Borden lists the following factors as influencing the growth of cigarette consumption since 1870.

(1) Breakdown of prejudices and taboos
(a) Social, moral prejudices
(b) Prejudice against women's usage
(2) War influence
(a) Smoking as a nervous release
(b) Widened social contacts
(3) Changing living habits
(a) The quickened tempo of modern life conducive to use of a short smoke
(4) Low cost of cigarettes
(5) Increased income of population
(6) Advertising and aggressive selling.

[Id., at 222.]

Professor Borden acknowledges that "It is impossible to set up any clear cause and effect relationship among so many variables of uncertain validity." (Ibid.). He concludes, however, that "advertising has been an important factor in speeding up a favorable trend of demand for cigarettes, a trend which has its roots in the changing habits of life and social attitudes arising from the whole complex of forces that is called social environment." (Id., at 227.) A similar view was stated also by Mr. George Washington Hill, former president of The American Tobacco Company. He said that, by advertising, "you don't benefit yourself most, I mean altogether. Of course, you benefit yourself more than the other fellow if you do a good job, but you help the whole industry if you do a good job." [42]

How has cigarette advertising contributed to maintaining and increasing total cigarette consumption? Major emphasis should be given to the magnitude of cigarette advertising expenditures. It is estimated that during the period 1952 to 1962, the leading six cigarette manufacturers spent approximately $1.2 billion for television, newspaper, and general magazine advertising. Their total expenditures for all media may have been as high as $2 billion. This level of expenditure has made it possible for cigarette manufacturers year in and year out to bring home the desirability of smoking to virtually all Americans. The degree to which Americans are exposed to cigarette advertising is amply illustrated by the network television audience data analyzed earlier. During a single evening time period, for example, it is estimated that cigarette advertising reaches 38 percent of the United States population 18 years of age and over, 46 percent of the population 13 to 17, and 26 percent of the population 2 to 12.

Available data indicate that much of the increase in recent years in cigarette consumption has resulted from the increasing proportion of young persons, particularly females, who are becoming smokers. Other factors than advertising have probably contributed to the increase in smoking among younger persons, and particularly to the decline in the age by which substantial numbers of women become regular smokers. It is probable, however, that portrayal of the desirability of smoking in cigarette advertising has been a significant factor in increasing cigarette consumption by younger persons.

3. *Effect of cigarette advertising upon type preference.* The greatly increased popularity of filter and menthol-filter cigarettes is the outstanding phenomenon in cigarette consumption in the years since 1952. Between 1952 and 1963, filter and menthol-filter cigarettes output increased from 5.2 billion units to almost 300 billion units. The output of regular cigarettes during this same period declined from 307.2 billion units to 109.3 billion units. Steadily mounting concern with the health hazards of smoking—a phenomenon parallel in time to the growth of filter and menthol-filter popularity—was a necessary condition for such changes to occur. (See e.g., Printers' Ink, Dec. 31, 1954, p. 27.) However, given the content of filter cigarette advertising, and given the fact that advertising expenditures in selected media for filter and menthol-filter cigarettes increased from $1.6 million in 1952 to $95.6 million in 1962, it would appear that the sufficient condition for this massive shift by American smokers to filter and menthol-filter cigarettes was that they were persuaded, by advertising, that filter and menthol-filter cigarettes were less hazardous to health than regular cigarettes. This conclusion is supported by the fact that filter and menthol-filter brands introduced after January 1, 1952, accounted for more than half of total cigarette consumption in 1963. This suggests that the absolute and relative increases in filter and menthol-filter output apparently did not result from a spontaneous decision by Americans to smoke such cigarettes.

The experience of the industry during the three-year period 1953 to 1955 is particularly illuminating. In both 1953 and 1954, total and per capita consumption declined from the 1952 level. Total consumption declined 6.4 percent and per capita consumption declined 8.8 percent. The only factor that has been suggested, in explanation of these declines is the publicity given to the mounting evidence of the serious health hazards of cigarette smoking in this period. Cigarette manufacturers reacted to this decline in demand by increasing advertising expenditures in network television, general magazines, and newspapers by 35.3 percent; and by 1955, both per capita and total consumption of cigarettes showed increases above the levels prevailing in 1954.

It is advertising data by type of cigarette, however, that are most informative on the cigarette industry's response to the health "scare" and the concomitant consumption declines. Advertising expenditures for regular cigarettes increased during 1953, but decreased during 1954 and 1955. Advertising expenditures for king-size cigarettes increased from $7.0 million in 1952 to $21.5 million in 1955. Advertising expenditures for filter cigarettes, however, showed the greatest relative and absolute increases. In 1952, expenditures in selected media for filter cigarettes totaled $1.6 million; by 1954, they were $13.8 million; the 1955 total was $26.5 million. In 1952, filter cigarettes had accounted for 2.8 percent of advertising expenditures; by 1955, filter cigarettes accounted for 34.5 percent of total advertising expenditures. The reaction of the industry, therefore, to the 1953 and 1954 consumption declines primarily took the form of a substantial relative and absolute increase in its advertising expenditures for filter cigarettes. These efforts played a significant role in increasing filter output from 5.2 billion units in 1952 to 74.7 billion units in 1955.

The content of filter and menthol-filter advertising in recent years supports the view that cigarette advertising has been significantly responsible for increases in filter and menthol-filter cigarette consumption. Filter cigarettes have varied in the explicitness of their assurances of safety, but all have promised the consumer a measure of health protection. One cigarette, for example, is described as containing a filter with "* * * the basic material science uses to purify air." Another cigarette claims it has the "Deep-Weave Filter." Another cigarette advertises its "Exclusive Selectrate Filter." Another cigarette claims that it has the "Micronite" filter.

Menthol-filter cigarettes, as earlier described, are similarly advertised, but advertising for these cigarettes portrays smoking virtually as a form of refreshment. Thus, one brand is advertised as "The most refreshing smoke of all"; another is said to be "Refreshing all day through." Many of the menthol-filter brands portray smoking in an idyllic outdoor environment—a setting that seems inconsistent with an inference of health hazards. For example, Salem, the leading menthol-filter brand, invites smokers to "Step into the wonderful world of Salem cigarettes."

In conclusion, it would appear that cigarette advertising has been a significant factor in persuading smokers to buy filter and menthol-filter cigarettes. Filter and menthol-filter advertising has persuaded smokers that such cigarettes are at least relatively safe, and has thus had the effect of neutralizing much of the impact of the medical findings on the dangers of smoking; menthol-filter advertising has portrayed cigarette smoking as being refreshing, thereby reinforcing the impression that smoking such cigarettes is relatively safe. At the same time, increases in the level of advertising expenditures for filter and menthol-filter cigarettes, and the intensive marketing of new brands of such cigarettes

[42] Quoted in Tennant, The American Cigarette Industry 137 (1950).

since the early 1950's, indicate that cigarette manufacturers have sought to capitalize on the increasing medical evidence of the dangers of smoking to sell such cigarettes.

4. *Cigarette advertising and young people.* A particularly important consideration in this proceeding is the impact of cigarette advertising on young people. Available data on smoking patterns indicate that an increasing proportion of persons in younger age groups are becoming regular smokers. As shown in table 4, supra, among males 25 to 34 years of age as of February 1955, 61.4 percent had become regular smokers prior to the age of 21, and among females 25 to 34 years of age, 28.9 percent had become regular smokers prior to the age of 21. By contrast, among males and females 45 to 54, 51.2 and 7.5 percent, respectively, had become regular smokers prior to the age of 21.

The magnitude and pervasiveness of cigarette advertising are such that virtually all Americans, including most children, are continually exposed to the portrayal of the desirability of smoking and to assurances respecting the safety or healthfulness of cigarette smoking. Audience data for network television advertising indicate that substantial numbers of children under 18 years of age are exposed to such advertising. It was earlier estimated that during a single evening time period, 46 percent of the population 13 to 17 years of age, and 26 percent of the population 2 to 12 years of age, are exposed to cigarette advertising.[43]

IV. The Requirements of the Federal Trade Commission Act in the Area of Consumer Protection

A. *The evolution of the Federal Trade Commission Act.* The Federal Trade Commission was established because it was widely agreed that judicial processes alone were not adequate to cope effectively with the problems of trade regulation in the far-flung, diverse and expanding American economy.[44] In proposing the creation of such a commission, President Wilson stated:

> The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the *processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.* [51 Cong. Rec. 1963 (1914); emphasis added.]

And Louis D. Brandeis, with Wilson the leading proponent of the trade commission idea, later described the genesis of the Commission in similar words: "It is a new device in administrative machinery, introduced by Congress in the year 1914, in the hope thereby of remedying conditions in business which a great majority of the American people regarded as menacing the general welfare, and which for more than a generation they had vainly attempted to remedy by the ordinary process of law." [45]

The framers of the Trade Commission Act of 1914 were primarily concerned with what they felt had been the inadequacy of the federal courts' enforcement of the Sherman Act.[46] Both the business community, which felt that such enforcement had created a climate of legal uncertainty in which effective business planning was impossible, and those who felt that the federal judiciary had been unsympathetic to the high purposes of the Act, concured in the belief that the task of maintaining competitive processes in the economy could perhaps be better performed by an expert, nonjudicial body, equipped with the distinctive and flexible powers of an independent administrative agency, along the lines of the highly successful Interstate Commerce Commission. (See Henderson, op. cit. supra note 44, at 21–23.)

But the framers of the Trade Commission Act were also concerned with trade practices contrary to the public interest on other grounds besides a tendency to monopoly. Here, too, it was felt, the traditional judicial processes had proved inadequate to the needs of the time. (See generally Handler, The Jurisdiction of the Federal Trade Commission Over False Advertising, 31 Col. L. Rev. 527 (1931).) For the existing law of unfair competition afforded incomplete protection to competitors and consumers against fraudulent, oppressive and unfair business practices.[47] It has, of course, long been settled that the Trade Commission Act embraces not only those trade practices that restrict competition or are conducive to monopoly, but all other practices contrary to public policy in the field of trade regulation.[48]

The task confided to the Trade Commission was altogether more complicated than merely policing the business community and punishing law violators. If the problems of trade regulation had been considered amendable to the conventional methods of eradicating undesirable conduct, a quite different statutory approach would probably have been selected. Congress would have enumerated the specific practices or methods sought to be proscribed and would have endowed the enforcement agency with the power to apply fully effective punitive or remedial sanctions. It did neither. It conferred on the Commission a deliberately comprehensive mandate "to prevent * * * unfair methods of competition in commerce" (Federal Trade Commission Act, section 5(a)(6), 15 U.S.C. section 45(a)(6)) without further specification of the forbidden conduct, and gave the Commission very broad powers of investigation and inquiry (see, e.g., section 6(b) of the Act). The Commission could, after a hearing, issue an order to cease and desist; but such an order, even if affirmed by a federal court of appeals on judicial review, would not be actually binding on the respondent until enforced by a court of appeals in a separate proceeding.[49] Thus, a Commission cease-and-desist order originally was "not self-executory. Standing alone it is only

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[43] These data do not include spot television advertising.

[44] On the background of the Federal Trade Commission Act, see Henderson, The Federal Trade Commission, chs. I, VI (1924); Thornton, Combinations in Restraint of Trade, ch. XLVI (1928); Blaisdell, The Federal Trade Commission 4–8 (1932); Montague, Unfair Methods of Competition, 25 Yale L. J. 20 (1915); Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666 (1926); Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517–43 (1962); F.T.C. v. Gratz, 253 U.S. 421, 432–37 (1920) (dissenting opinion of Mr. Justice Brandeis).

[45] F.T.C. v. Gratz, 253 U.S. 421, 432 (1920) (dissenting opinion). As one of the leading authorities on the Trade Commission Act has stated, "The very creation of the Commission betokened a congressional dissatisfaction with the procedures and techniques of the judicial system; otherwise the task of enforcement could have been delegated to the courts and the Department of Justice." Handler, Unfair Competition, 21 Iowa L. Rev. 175, 251 (1936).

[46] See, e.g., 51 Cong. Rec. 13047 (1914) (remarks of Senator Cummins); 51 Cong. Rec. 8977 (1914) (remarks of Congressman Murdock). The day after the Supreme Court decided Standard Oil Co. v. United States, 221 U.S. 1 (1911), in which the "Rule of Reason" in Sherman Act interpretation was announced, Senator Newlands proposed what later became the Trade Commission:

> "The question therefore presents itself to us whether we are to permit in the future the administration regarding these great combinations to drift practically into the hands of the courts and subject the question as to the reasonableness or unreasonableness of any restraint upon trade . . . to the varying judgments of different courts upon the facts and the law, or whether we will organize, as the servant of Congress, an administrative tribunal similar to the Interstate Commerce Commission, with powers of recommendation, with powers of condemnation, with powers of correction similar to those enjoyed by the Interstate Commerce Commission over interstate transportation." 47 Cong. Rec. 1225 (1911); see id., at 1227, 2444, 2619–21; S. Rep. No. 1326, 62d Cong., 3d Sess. (1913).

Senators Newlands and Cummins, the most outspoken opponents of the handling of the Sherman Act by the courts and the Attorney General, played a leading role in the framing of the Trade Commission Act.

[47] In the famous case of American Washboard Co. v. Saginaw Mfg. Co., 103 Fed. 281 (6th Cir. 1900), it had been held that injury to the public was not a ground on which an action for unfair competition could be maintained. One of the purposes of the Federal Trade Commission Act was to close the gap in trade regulation law opened up by that decision. Royal Baking Co. v. F.T.C., 281 Fed. 744, 752 (2d Cir. 1922); Nims, Unfair Competition and Trademarks § 8 (4th ed. 1947). See Sears, Roebuck & Co. v. F.T.C., 258 Fed. 307 (7th Cir. 1919); Curtis Pub. Co. v. F.T.C., 270 Fed. 881, 908 (3d Cir. 1921), aff'd, 260 U.S. 568 (1923).

[48] E.g., F.T.C. v. Winsted Hosiery Co., 258 U.S. 483 (1922); F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934); F.T.C. v. Raladam Co., 283 U.S. 643, 651 (1931).

[49] This "three bites at the apple" procedure was changed in 1938. See Federal Trade Commission Act, § 5, as amended by Wheeler-Lea Act, § 3, 52 Stat. 111, as amended, 15 U.S.C. § 45(e), making Commission cease-and-desist orders final and binding without the necessity of a separate enforcement proceeding.

informative and advisory. The Commission can not enforce it." [50]

The Commission was not intended to be a simple enforcement agency, charged with preventing well-understood, clearly defined, unlawful conduct. Its principal function was, through the use of its broad powers of investigation and inquiry, and through the accumulation of expert knowledge and experience in the field of trade regulation, to explore, identify and define those competitive practices that should be forbidden as "unfair" because contrary to public policy. The Commission was expected to proceed not only against practices forbidden by statute or common law, but also against practices not previously considered unlawful, and thus to create a new body of law—a law of unfair competition adapted to the diverse and changing needs of the complex and evolving modern American economy.[51]

In an early case it was stated that the standard of unfairness in Section 5 was "clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression * * *" F.T.C. v. Gratz, 253 U.S. 421, 427 (1920).

However, the Supreme Court has many times rejected a static conception of the Trade Commission's responsibilities. As early as 1922, in F.T.C. v. Winsted Hosiery Co., 258 U.S. 483, the Court held that the deceptive mislabeling of consumer goods was forbidden by the Federal Trade Commission Act in circumstances where no common-law or statutory violation could have been demonstrated. (See also Sears, Roebuck & Co. v. F.T.C., 258 Fed. 307 (7th Cir. 1919).) The subsequent development of a comprehensive body of law by the Commission relating to deceptive practices, a development which has frequently been approved by the Supreme Court (see, e.g., A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 532–33 (1935); id., at 552 (concurring opinion of Mr. Justice Cardozo)), demonstrates that the Commission's authority is not confined to practices already forbidden by statute or common law.[52]

The course of decisions cutting back from the extreme implications of the Gratz dictum culminated in F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934) (see also F.T.C. v. Raladam Co., 283 U.S. 643 (1931); A. L. A. Schechter Poultry Corp. v. United States, supra), the leading case defining the Commission's powers and responsibilities under its organic act. The Court stated in Keppel:

> [W]e cannot say that the Commission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court.
>
> Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.
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> The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. * * * But as this Court has pointed out it also had a broader purpose. * * * As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared "unfair competition" to be unlawful. But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase "unfair methods of competition" was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" [291 U.S., at 309–12.]

The Court, describing the Commission's role in elaborating the content of the Act, went on to state:

> While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, Federal Trade Comm'n v. Gratz, supra, in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." * * * If the point were more doubtful than we think it, we should hesitate to reject the conclusion of the Commission, based as it is upon clear, specific and comprehensive findings supported by evidence. [Id., at 314.]

The principle that emerges from Keppel, from the decisions that both precede and follow it, from the legislative history and background of the Trade Commission Act, and from the Commission's fifty years of efforts to implement its mandate from Congress, is that the Commission's responsibilities are not limited to determining whether particular practices fall within pre-existing categories of illegality and entering cease-and-desist orders against the guilty parties accordingly. It is also to determine, within broad limits, what kinds of trade practices should be forbidden in the public interest because they are unfair or deceptive and thus injurious to competitors or the consuming public.

Prior to the 1938 Wheeler-Lea amendments to the Trade Commission Act, the Supreme Court held that the Commission's jurisdiction over unfair trade practices was limited to cases in which such a practice was used as a weapon for diverting business from, or injuring or impairing the business of, a competitor. F.T.C. v. Raladam Co., supra. It was recognized that a method of competition might be unlawful under Section 5 because it deceived consumers, even though it was not monopolistic or anticompetitive, but it was thought that deceptive acts or practices could not be suppressed under the Trade Commission Act if they were not utilized to confer a competitive advantage upon the respondent. The 1938 amendments, in expressly making "unfair or deceptive acts or practices in commerce," in addition to "unfair methods of competition in commerce," subject to the Commission's jurisdiction, were intended to broaden the Commission's jurisdiction to embrace deceptive acts or practices in situations where no effect on competition or competitors could be shown.[53] It should be noted that the amendments do not confine the Commission's jurisdiction to deceptive acts or practices, on the one hand, and monopolistic or anticompetitive methods, on the other. In addition to forbidding deceptive acts or practices and unfair methods of competition, Section 5, as amended, forbids "unfair" acts or practices.

The purpose of the amendments was to make clear that the protection of the consumer from unfair trade practices, equally with the protection of competitors and the competitive process, is a concern of public policy within the scope of responsibility of the Federal Trade

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[50] F.T.C. v. Gratz, 253 U.S. 421, 432 (1920) (dissenting opinion of Mr. Justice Brandeis). See New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., F. 2d (3d Cir. 1964).

[51] "Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. . . . Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed." 253 U.S., at 436–37. As stated by Senator Cummins in the debates on the trade commission proposal, "the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise. * * *" 51 Cong. Rec. 14003 (1914). See, e.g., F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934); F.T.C. v. Algoma Lumber Co., 291 U.S. 67 (1934).

[52] Similarly, in the Commission's antitrust activities under the Trade Commission Act it has become established that the Commission is not limited to forbidding conduct already forbidden by the Sherman or Clayton Acts. See, e.g., F.T.C. v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953); F.T.C. v. Cement Institute, 333 U.S. 683 (1948); Grand Union Co. v. F.T.C., 300 F. 2d 92 (2d Cir. 1962); Mytinger & Casselberry, Inc. v. F.T.C., 301 F. 2d 534 (D.C. Cir. 1962).

[53] S. Rep. No. 221, 75th Cong., 1st Sess. 3 (1937); Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 96 (1939).

Commission. The legislative history of the Wheeler-Lea amendments to Section 5 discloses explicit and substantial concern with the exploitation of consumers through deceptive, unethical or otherwise unfair marketing methods.[54] The Keppel decision was mentioned a number of times in the deliberations,[55] and its broad and far-reaching conception of the Commission's powers and duties in the field of unfair trade practices received Congressional approval in the enactment of the Wheeler-Lea amendments.

Another result of the Wheeler-Lea Act was the enlargement of the Federal Trade Commission Act to include new provisions (§§ 12–17) dealing specifically with the false advertising of foods, drugs, devices and cosmetics. Since 1939, moreover, Congress has successively augmented the Commission's jurisdiction in the area of consumer protection several times by the enactment of statutes dealing in detail with particular industries.[56] The public policy declared by Congress in the food and drug sections of the Wheeler-Lea Act and in the specialized consumer-protection statutes is relevant in determining the requirements of the more general provisions of Section 5. The food and drug sections express a Congressional determination that the lawful scope of a trade practice may depend in significant part upon the nature of the product involved, and its relationship to human health and safety, while the specialized statutes express a determination that, in particular circumstances, consumer protection may require not only that the seller refrain from affirmative misrepresentation, but also that he make positive and detailed disclosure of material facts concerning his product.

B. *The present law of consumer protection under the Federal Trade Commission Act* — 1. *The test of legality under Section 5.* In the Keppel decision the Supreme Court described the standard of lawfulness under Section 5 of the Federal Trade Commission Act in language similar to that used by the Court in reference to the due process clause of the Fourteenth Amendment.[57] Section 5, indeed, bears much the same relation to the community's evolving standards of honest, fair and ethical conduct in business as the due process clause bears to the community standards of fairness and justice in governmental action. In the words of Judge Learned Hand, describing the Commission's power in the field of deceptive and unfair practices,

> The Commission has a wide latitude in such matters; its powers are not confined to such practices as would be unlawful before it acted; they are more than procedural; its duty in part at any rate, is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.[58]

These judicial expressions accord fully with the original understanding of the framers of the Trade Commission Act. "In Section 5 of the Trade Commission Act, it is obvious that no specific rules of conduct were prescribed. The section stated a general ethical and economic principle, and relied upon the course of administration and judicial decision to give it content." [59] It is clear that, at least in the field of advertising or labeling, any practice in commerce that exploits or oppresses the consuming public may be prohibited by the Commission under Section 5 even if there is no specific precedent for its prohibition. And whether a practice should be forbidden is a question committed to the Commission's sound discretion. As Keppel and many other decisions make clear, the determination of the substantive scope of Section 5 is to a considerable extent the Commission's own responsibility.[60]

2. *Deceptive acts or practices.* Advertising that prevents the consumer from making a free and informed choice of what or whose products to buy by misrepresenting facts that the consumer considers material to his decision injures honest competitors and the consuming public. The body of law on deceptive acts and practices built up by the Commission and the courts in fifty year of law enforcement proscribes such conduct in all its various manifestations. The controlling legal standard is a simple one: If the seller attempts to deceive the consumer in any particular which could influence the latter's buying choice—if, in other words, he uses any false inducement—he has committed a deceptive act or practice in violation of Section 5.[61]

In the application of this standard to the many different factual patterns that have arisen in cases before the Commission, certain principles have become well established. One is that under Section 5 actual deception of particular consumers need not be shown. All that need be shown, to support a finding of illegality, is that the challenged representation has a substantial capacity or tendency to deceive.[62] It has been held many times (see note 61, supra) that the test of unlawful deception under Section 5 is whether the advertisement in question is likely to deceive a substantial segment of the purchasing public, or of that part of the purchasing public to whom the representation is directed, and that this likelihood may be inferred by the Commission, in the exercise of its accumulated administrative knowledge and experience, on the basis of the challenged advertisement itself.[63]

The traditional common-law distinction between misrepresentation of fact and of opinion—the latter not being considered actionable [64]—has to a large extent been rejected by decisions under the Trade Commission Act. An advertiser may no longer offer his unsubstantiated opinion concerning the quality or merits of his product if he does so in such a way that the consumer is induced to rely on

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[54] The test of legality under Section 5 had to be amended, it was stated, "to stop the exploitation or deception of the public." S. Rep. No. 1705, 74th Cong., 2d Sess. 3 (1936). See also S. Rep. No. 221, 75th Cong., 1st Sess. 3 (1937). Cf. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937).

[55] See, e.g., Hearings on S. 3744 before the H. Comm. on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 85, 89–90 (1936); Hearing on H.R. 3143 before the H. Comm. on Interstate and Foreign Commerce, 75th Cong., 1st Sess. 14, 17, 42 (1937).

[56] Wool Products Labeling Act of 1939, 54 Stat. 1128, 15 U.S.C. §§ 68–68j; Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. §§ 69–69j; Flammable Fabrics Act, 67 Stat. 111, 15 U.S.C. §§ 1191–1200; Textile Fiber Products Identification Act, 72 Stat. 1717, 15 U.S.C. §§ 70–70k.

[57] F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 312 (1934), citing Davidson v. New Orleans, 96 U.S. 97, 104 (1878). See also F.T.C. v. Raladam Co., 283 U.S. 643, 648 (1931).

[58] F.T.C. v. Standard Educ. Soc., 86 F. 2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937). See also F.T.C. v. Raladam Co., 283 U.S. 643, 651 (1931). Cf. F.T.C. v. Klesner, 280 U.S. 19, 27–28 (1929) (opinion by Mr. Justice Brandeis).

[59] Henderson, op. cit. supra note 44, at 36. "Courts have always recognized the customs of merchants, and it is my impression that under this act the Commission and the courts will be called upon to consider and recognize the fair and unfair customs of merchants, manufacturers and traders, and probably prohibit many practices and methods which have not heretofore been clearly recognized as unlawful." 51 Cong. Rec. 11593 (1914) (remarks of Senator Saulsbury). "[I]t would be utterly impossible for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade, for we are beginning to realize that there is a standard of morals in trade or that there ought to be." 51 Cong. Rec. 11084 (1914) (remarks of Senator Newlands). See Handler, The Jurisdiction of the Federal Trade Commission Over False Advertising, 31 Col. L. Rev. 527, 532–35 (1931); F.T.C. v. R. F. Keppel & Bro., Inc., supra, 291 U.S., at 310–12, nn. 41–43.

[60] See, e.g., decisions cited in note 58, supra; F.T.C. v. Algoma Lumber Co., 291 U.S. 67 (1934); F.T.C. v. Royal Milling Co., 288 U.S. 212 (1933); Hastings Mfg. Co. v. F.T.C., 153 F. 2d 253 (6th Cir. 1946).

[61] See e.g., F.T.C. v. Raladam Co., 316 U.S. 149 (1942); F.T.C. v. Royal milling Co., 288 U.S. 212, 216–17 (1933); F.T.C. v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); F.T.C. v. Standard Educ. Soc., 302 U.S. 112, 116–17 (1937); L. Heller & Son, Inc. v. F.T.C., 191 F. 2d 954 (7th Cir. 1951). See Barnes, False Advertising, 23 Ohio St. L.J. 597 (1962); Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1025–34 (1956).

[62] See, e.g., F.T.C. v. Algoma Lumber Co., supra, at 81; F.T.C. v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922); F.T.C. v. Balme, 23 F. 2d 615, 620 (2d Cir. 1928); Gimbel Bros., Inc. v. F.T.C., 116 F. 2d 578 (2d Cir. 1941); Bockenstette v. F.T.C., 134 F. 2d 369, 371 (10th Cir. 1943); Progress Tailoring Co. v. F.T.C., 153 F. 2d 103, 105 (7th Cir. 1946).

[63] E. F. Drew & Co. v. F.T.C., 235 F. 2d 735 (2d Cir. 1956); De Gorter v. F.T.C., 244 F. 2d 270, 283 (9th Cir. 1957); Carter Products, Inc. v. F.T.C., 268 F. 2d 461, 493–95 (9th Cir. 1959); Royal Oil Corp. v. F.T.C., 262 F. 2d 741, 745 (4th Cir. 1959); New Am. Library of World Literature v. F.T.C., 213 F. 2d 143 (2d Cir. 1954); Zenith Radio Corp. v. F.T.C., 143 F. 2d 29 (7th Cir. 1944); Hillman Periodicals v. F.T.C., 174 F. 2d 122 (2d Cir. 1949).

[64] See Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 92–93 (1939); Handler, Unfair Competition, 21 Iowa L. Rev. 175, 195, 230 (1936). Some early decisions under Section 5 continued to draw a distinction between fact and opinion. See, e.g., Raladam Co. v. F.T.C., 42 F. 2d 430 (6th Cir. 1930), aff'd on other grounds, 283 U.S. 643 (1931). But see E. Griffiths Hughes, Inc. v. F.T.C., 77 F. 2d 886 (2d Cir. 1935).

his opinion.[65] While the courts still make occasional reference to the fact-opinion distinction (see, e.g., Koch v. F.T.C., 206 F. 2d 311, 316–17 (6th Cir. 1953)), they recognize no privilege for statements of opinion in advertising, and invariably regard as a deceptive and unlawful representation any opinion stated in such a manner as to mislead the consumer.[66] The traditionally broad scope of permissible "puffing" has been narrowed to include only expressions that the consumer clearly understands to be pure sales rhetoric on which he should not rely in deciding whether to purchase the seller's product.[67] The test, thus, is not whether a representation is intended as a statement of fact or one of opinion, but whether it is likely to mislead the consumer.[68]

The loosening of restrictive common-law doctrine is also reflected in the expanded concern under the Trade Commission Act with advertising in which deception is present in a form other than a false statement. The Act's objective in the field of advertising and labeling—to protect the consumer from being misled in his choice of goods and services to buy—is flouted no less by false and misleading implications, suggestions or insinuations or, as we are about to consider, by failure to disclose material facts, than by explicit misstatements. As anyone who reads newspapers or magazines, or watches television or listens to the radio, well knows, modern advertising relies to a large extent on suggestions and associations, and other forms of indirection and "soft sell," as well as upon explicit claims for the advertised products. Advertisers have found that the explicit claim is not the only effective method of selling their products to the consumer. Since other methods are widely used, it is the Commission's plain duty to require that they be used honestly.

It is now well settled that Section 5 proscribes "any advertising matter whatsoever which creates a misleading impression in the mind of the ordinary purchaser," [69] for "The skilful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions. * * * [A]n advertisement may be deemed misleading even though the statements of fact it contains are not in and of themselves deceptive. The statutory ban applies to that which is suggested as well as that which is asserted." Handler, The Control of False Advertising Under the Wheeler-Lea Act, supra note 64, at 99, 102. The decisions applying this principle are legion.[70]

Finally, it is well settled that whether an advertisement represents an objective quality of the product or some other, "extrinsic" factor important to the consumer (e.g., the business status of the advertiser, F.T.C. v. Royal Milling Co., 288 U.S. 212 (1933), or whether the product is new or reprocessed, Mohawk Refining Co. v. F.T.C., 263 F. 2d 818 (3d Cir. 1959)) is immaterial (F.T.C. v. Algoma Lumber Co., 291 U.S. 67 (1934)), since "the public is entitled to get what it chooses" (id., at 78).

We have briefly reviewed some of the better-known principles governing deceptive advertising under Section 5 in order to demonstrate that the standard of lawfulness is a simple, realistic and commonsense one. The application of the standard to a particular advertisement challenged under Section 5 of the Trade Commission Act ordinarily requires the answering of three questions: What is the probable impression of the advertisement on the average consumer to whom it is directed? Is that impression true or false? Is it likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words? [71] These are questions of fact, not law.[72]

3. *Failure to disclose material facts.* An advertiser's failure to disclose material facts in circumstances where the effect of nondisclosure is to deceive a substantial segment of the purchasing public is fully equivalent to deception accomplished through misleading statements or suggestions. "To tell less than the whole truth is a well known method of deception." P. Lorillard Co. v. F.T.C., 186 F. 2d 52, 58 (4th Cir. 1950).

For example, if a seller has created in the minds of consumers a false impression of the quality or merits of his product, the Commission may enter an order not only forbidding the deceptive advertising, but in addition requiring the seller to make affirmative disclosure in all future advertising in order to correct the false impression created by his deceptive conduct. E.g., Haskelite Mfg. Co. v. F.T.C., 127 F. 2d 765 (7th Cir. 1942).[73] Such additional relief, necessary in order to cure fully the ill effects of the seller's past unlawful conduct, could be continued at least until the false impression in the public mind has been dissipated by a period of honest advertising.

A requirement of disclosure may also be appropriate in the light of affirmative claims or representations, not false or deceptive in themselves, made by the seller. Such a principle is expressly stated in Section 15 of the Federal Trade Commission Act with respect to the advertising of foods, drugs, devices, and cosmetics, but it has been applied in Section 5 cases as well.[74] Thus in the Old Gold case (P. Lorillard Co. v. F.T.C., 186 F. 2d 52 (4th Cir. 1950)), the respondent had advertised that a Reader's Digest survey had found its cigarettes to be lowest in tar and nicotine content. This was a true statement of the findings of the survey, but without additional disclosure

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[65] Feil v. F.T.C., 285 F. 2d 879, 896–97 (9th Cir. 1960); Barnes, False Advertising, 23 Ohio St. L. J. 597, 646 (1962). Cf. Handler, The Control of False Advertising Under the Wheeler-Lea Act, supra note 64, at 100–01.

[66] See, e.g., Koch v. F.T.C., supra; Procter & Gamble Co. v. F.T.C., 11 F. 2d 47 (6th Cir. 1926); Wybrant System Products Corp. v. F.T.C., 266 F. 2d 571 (2d Cir. 1959) (per curiam); Erickson Hair & Scalp Specialists v. F.T.C., 272 F. 2d 318 (7th Cir. 1959); Aronberg v. F.T.C., 132 F. 2d 165 (7th Cir. 1942). Cf. 21 U.S.C. § 321(n) (Federal Food and Drug Act).

[67] Compare Gulf Oil Corp. v. F.T.C., 150 F. 2d 106, 109 (5th Cir. 1945); Steelco Stainless Steel, Inc. v. F.T.C., 187 F. 2d 693, 697–98 (7th Cir. 1951); Goodman v. F.T.C., 244 F. 2d 584 (9th Cir. 1957); Colgate-Palmolive Co., 59 F.T.C. 1452, 1469 (1961), rev'd on other grounds, 310 F. 2d 89 (1st Cir. 1962); and Prosser, Torts, § 90, p. 557 (2d ed. 1955), with Kidder Oil Co. v. F.T.C., 117 F. 2d 892 (7th Cir. 1941); H.R. Rep. No. 1613, 75th Cong., 1st Sess. 4 (1937).

[68] A related principle is that a deceptive representation cannot be defended on the ground of the advertiser's good faith or honest belief in the truth of the representation. See, e.g., Gimbel Bros., Inc. v. F.T.C., 116 F. 2d 578 (2d Cir. 1941); Feil v. F.T.C., 285 F. 2d 879 (9th Cir. 1960).

[69] Handler, The Control of False Advertising Under the Wheeler-Lea Act, supra note 64, at 102. Cf. F.T.C. v. National Health Aids, Inc., 108 F. Supp. 340 (D. Md. 1952); People v. Minjac Corp., 4 N.Y. 2d 320, 151 N.E. 2d 180, 175 N.Y.S. 2d 16 (1958).

[70] See, e.g., D.D.D. Corp. v. F.T.C., 125 F. 2d 679 (7th Cir. 1942); Aronberg v. F.T.C., 132 F. 2d 165 (7th Cir. 1942); Sebrone v. F.T.C., 135 F. 2d 676, 679 (7th Cir. 1943); Caldwell v. F.T.C., 111 F. 2d 889 (7th Cir. 1940); Parker Pen Co. v. F.T.C., 159 F. 2d 509 (7th Cir. 1946); C. Howard Hunt Pen Co. v. F.T.C., 197 F. 2d 273 (3rd Cir. 1952); Ford Motor Co. v. F.T.C., 120 F. 2d 175 (6th Cir. 1941); P. Lorillard Co. v. F.T.C., 186 F. 2d 52, 58 (4th Cir. 1950); Charles of the Ritz Dist. Corp. v. F.T.C., 143 F. 2d 676, 679 (2d Cir. 1944); Kalwajtys v. F.T.C., 237 F. 2d 654, 656 (7th Cir. 1956).

[71] The last of these questions is ordinarily easily answered when there is an affirmative representation of some sort, for "If a statement is important enough to be included in an advertisement, it is important enough to be true." Handler, supra note 69, at 98. See Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1032 (1956).

[72] See, e.g., Carter Products, Inc. v. F.T.C., 268 F. 2d 461, 496 (9th Cir. 1959); Barnes, supra note 65, at 655. See also Gulf Oil Corp. v. F.T.C., 150 F. 2d 106, 108 (5th Cir. 1945).

[73] "The examiner's order, on this phase of the case, simply prohibits respondents from representing 'that their watches are manufactured in their entirety in the United States.' This prohibition will not suffice to assure discontinuance of the deception found. As we have pointed out, the name Waltham, in part through respondents' own efforts, has come to be associated by the public with entirely American-made watches. Deception of the public can be avoided only by requiring respondents, wherever they use the name 'Waltham' in the advertisement or labeling of their watches, to disclose, clearly and prominently, the foreign origin of any of the components thereof. Respondents should be prohibited from using the term 'American,' or any reference to 'Waltham,' in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate." Waltham Precision Instrument Co., F.T.C. Docket 6914 (decided July 20, 1962), pp. 8–9, aff'd, —— F. 2d —— (7th Cir. 1964). Cf. Rudolph R. Siebert Co., 49 F.T.C. 1418 (1953).

[74] See, e.g., Gimbel Bros., Inc. v. F.T.C., 116 F. 2d 578 (2d Cir. 1941); Royal Baking Powder Co. v. F.T.C., 281 Fed. 744 (2d Cir. 1922); Allen B. Wrisley Co. v. F.T.C., 113 F. 2d 437 (7th Cir. 1940); Clinton Watch Co. v. F.T.C., 291 F. 2d 838 (7th Cir. 1961); Raladam Co., 24 F.T.C. 475 (1937), order aff'd, 316 U.S. 149 (1942).

the statement had misleading implications. The advertisement implied that respondent's cigarettes were less harmful than competing brands having higher tar and nicotine contents. But the survey had concluded that no cigarettes, including respondent's, had a sufficiently low tar and nicotine content to be significantly less harmful than other cigarettes. Respondent failed to disclose this qualifying fact, and thereby failed to correct the false impression created by its literally true representation. This was a deceptive half-truth and clearly unlawful.

Even if no affirmative representation is made, nondisclosure may constitute actionable deception.[75] The Commission has, for example, brought a number of proceedings against sellers who fail to disclose the country of origin of their products. Suppose that the consumer of a particular product both prefers the domestic product and believes, in the absence of an affirmative statement to the contrary, that the product is domestic; in such a case the seller of the foreign substitute who fails to disclose its foreign origin has deceived the consumer.[76] Another line of nondisclosure cases under Section 5 involves hazardous commodities.[77] Suppose that a seller advertises a silver polish, and while he does not claim that the polish is safe for ordinary use, neither does he warn that it is dangerous; but in fact the fumes from the polish are dangerous to health or safety even under conditions of normal use. Since the consumer's normal expectation is that in the absence of any warning to the contrary such a product can be used safely, he is likely to be deceived if the product is dangerous and the warning is omitted.

The principle crystallized in these decisions is that Section 5 forbids sellers to exploit the normal expectations of consumers in order to deceive just as it forbids sellers to create false expectations by affirmative acts. The nature, appearance or intended use of a product may create an impression in the mind of the consumer—for example, that it is made in the U.S.A., or that it is silk, or that it is safe—and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception.

The Commission's formal proceedings under Section 5 in the area of "pure" failure to disclose (i.e., where no affirmative representations have been made by the seller) have involved labeling more frequently than advertising. Orders requiring affirmative disclosure in advertising as well as labeling have, however, been entered in a number of cases;[78] and the principle of deceptive nondisclosure applies with substantially equal force to advertising, for it is well settled that dishonest advertising is not cured or excused by honest labeling.[79] Whether the ill effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission.[80] The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment?

The standard of lawfulness (§ 15(a)(1)) under the food and drug sections of the Trade Commission Act, which were added by the Wheeler-Lea Act in 1938, has a definite bearing on the problem of deceptive nondisclosure under section 5. Section 15(a)(1) provides in pertinent part:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

This definition appears not to change the test of an actionable deception so far as affirmative representations are concerned. To be sure, Congress, in enacting section 15, was consciously concerned to reach "the most subtle as well as the most vicious types of advertisement" (H.R. Rep. No. 1613, 75th Cong., 1st Sess. 5 (1937)). It was explained that "The provisions of this bill covering false advertising are far reaching" (id., at 4), and that "it [the bill] covers every case of imposition on a purchaser for which there could be a practical remedy" (id., at 5). But we have seen that section 5 is fully as broad as this. Section 15, however, in contrast to section 5, is explicit in making nondisclosure a possible basis of liability. It specifies two circumstances in which nondisclosure may render an advertisement false and hence unlawful.

The first is where the undisclosed facts are material by virtue of representations made in the advertisement. This is simply the principle of the deceptive half-truth which, as has been pointed out, is an established principle of Section 5 liability. The Commission's recent "Outgro" decision (American Home Products Corp., F.T.C. Docket 8478 (decided September 27, 1963)) exemplifies the operation of the principle under Section 15. Respondent's product, a

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[75] See, e.g., Segal v. F.T.C., 142 F. 2d 255 (2d Cir. 1944); L. Heller & Son, Inc. v. F.T.C., 191 F. 2d 954 (7th Cir. 1951); American Tack Co., Inc. v. F.T.C., 211 F. 2d 239 (2d Cir. 1954) (per curiam); Schachnow v. F.T.C., 1940–43 CCH Trade Cases ¶56118 (3d Cir. 1941); Rabhor Co. v. F.T.C., 1940–43 CCH Trade Cases ¶56220 (2d Cir. 1942) (per curiam); Mary Muffet, Inc. v. F.T.C., 194 F. 2d 504 (2d Cir. 1952) (per curiam); Mohawk Refining Corp. v. F.T.C., 263 F. 2d 818 (3d Cir. 1959); Kerran v. F.T.C., 265 F. 2d 246 (10th Cir. 1959); Royal Oil Corp. v. F.T.C., 262 F. 2d 741 (4th Cir. 1959); Theodore Kagen Corp. v. F.T.C., 283 F. 2d 371 (D.C. Cir. 1960) (per curiam); Bantam Books, Inc. v. F.T.C., 275 F. 2d 680 (2d Cir. 1960); New Am. Library of World Literature v. F.T.C., 227 F. 2d 384 (2d Cir. 1955).

[76] In addition to the foreign-origin cases, sellers have been required to disclose, for example, that their oil is not new (e.g., Mohawk Refining Corp., supra), that their books are abridged (e.g., Bantam Books, Inc., supra), that their watch bezels are not gold (e.g., Theodore Kagen Corp., supra), that their fabrics are rayon (e.g., Mary Muffet, Inc.), or that their goods are used (e.g., Schachnow, supra).

[77] Seymour Dress & Blouse Co., 49 F.T.C. 1278 (1953); Rudolph R. Siebert Co., 49 F.T.C. 1418 (1953); Academy Knitted Fabrics Corp., 49 F.T.C. 697 (1952); Fisher & DeRitis, 49 F.T.C. 77 (1952); Harrison Mills, Inc., 50 F.T.C. 1044 (1954) (complaint dismissed); James B. Tompkins, F.T.C. Docket 8567 (decided Dec. 5, 1963).

[78] The fully litigated cases in which such orders have been entered include: Royal Oil Corp. v. F.T.C., 262 F. 2d 741 (4th Cir. 1959); Mohawk Ref. Co. v. F.T.C., 263 F. 2d 818 (3d Cir. 1959); Kerran v. F.T.C., 265 F. 2d 246 (10th Cir. 1959); Rabhor Co. v. F.T.C., 1940–43 CCH Trade Cases ¶ 56220 (2d Cir. 1942) (per curiam); Salyer Refining Co., 54 F.T.C. 1026 (1958); Asheville Fabrics, Inc., 49 F.T.C. 1190 (1953); Louis A. Walton Co., 35 F.T.C. 335 (1942); Samuel R. Israel, 32 F.T.C. 20 (1940); Ralph Corn Underwear, Inc., 31 F.T.C. 1076 (1940); Adolph Friedman, 28 F.T.C. 1660 (1939); Storyk Bros., Inc., 28 F.T.C. 608 (1939). Cf. Mary Muffet, Inc. v. F.T.C. 194 F. 2d 504 (2d Cir. 1952) (per curiam), aff'g 47 F.T.C. 724 (1950).

[79] Carter Products, Inc. v. F.T.C., 186 F. 2d 821, 822–24 (7th Cir. 1951). See F.T.C. v. Standard Educ. Soc., 302 U.S. 112 (1937); Book-of-the-Month Club v. F.T.C., 202 F. 2d 486 (2d Cir. 1953); Progress Tailoring Co. v. F.T.C., 153 F. 2d 103 (7th Cir. 1946); Exposition Press, Inc. v. F.T.C., 295 F. 2d 869 (2d Cir. 1961). "The law is violated if the first contact or interview is secured by deception, * * * even though the true facts are made known to the buyer before he enters into the contract of purchase." Carter Products, Inc., supra, at 824.

[80] "Congress placed the primary responsibility for fashioning such [cease-and-desist] orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." F.T.C. v. Ruberoid Co., 343 U.S. 470, 473 (1952). "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Jacob Siegel Co. v. F.T.C., 327 U.S. 608, 612–13 (1946). "[T]he Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb that measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme." Herzfeld v. F.T.C., 140 F. 2d 207, 209 (2d Cir. 1944) (L. Hand, J.). Although the foregoing judicial expressions occur in the context of remedies fashioned under Section 5(b) of the Trade Commission Act or Section 11(b) of the Clayton Act, i.e., cease-and-desist orders, they would appear equally applicable where the remedy takes the form of a trade regulation rule.

treatment for ingrown toenail, did in fact, as it claimed in respondent's advertising, afford "relief and protection" respecting this condition. But the relief was temporary only, and the protection nonexistent once infection set in. The use of "Outgro" after the onset of infection might actually aggravate the danger from such infection and make it more difficult to cure. Without explicit disclosure of these facts, which qualified and explained the claim of "relief and protection," the danger was acute that purchasers of the product would misunderstand the limits of its effectiveness and thereby forego necessary medical attention.[81]

The second circumstance specified in Section 15 under which nondisclosure may render an advertisement false is also one to which we have adverted, in discussing the requirements of Section 5 in the field of hazardous commodities. If the actual consequences of normal use of the advertised product are different from the expected consequences, they should be disclosed to avoid creating a false impression.[82] If, for example, a food is advertised without disclosure of dangers in eating it of which the consumer is unaware, there is palpable—and very dangerous—deception.

While Section 15 adverts specifically to nondisclosure and Section 5 does not, the legal test under Section 15 in the nondisclosure area is, if anything, probably narrower than that under Section 5. Many of the "pure" nondisclosure cases actionable under Section 5, apart from the hazardous-commodities cases, could not be maintained under Section 15 because they do not involve the nondisclosure of facts material with respect to the consequences of using the product.

Although the standard of lawfulness in Section 15 with respect to failure to disclose material facts seems not to broaden the duties already borne by sellers subject only to the more generally worded prohibitions of Section 5, it illumines those requirements as applied in specific situations. For one thing, it is noteworthy that the specific references in Section 15 to nondisclosure as a basis for finding a violation of the Federal Trade Commission Act occur in the context of advertising, not labeling, regulation; the food and drug sections of the Trade Commission Act are expressly limited to advertising and exclude labeling (§ 15(a)(1)). Congress has determined, then, that there are circumstances in which the nondisclosure of material facts in advertising should be prevented on its own account, wholly irrespective of what disclosure is made or required in labeling.

For another thing, Section 15, in its explicit concern with nondisclosure of the consequences of using products which, like food, drugs, devices, and cosmetics, are intended to be used in intimate contact with the human body, enunciates a principle of false and deceptive advertising that is of general applicability where any such products are concerned. The principle is that sellers of a product the use of which may involve danger to human health or safety are under a duty to disclose to the consumer the consequences of use, where those consequences are not known to the consumer. It is true that the disclosure-of-consequences provision of Section 15 is not limited to situations of danger; a seller may be required to disclose the consequences of using his food, drug, device or cosmetic even though no danger to health or safety is posed by nondisclosure. See, e.g., Keele Hair & Scalp Specialists, Inc. v. F.T.C., 275 F. 2d 18 (5th Cir. 1960). Still, it seems clear that in adding Section 15 to the Trade Commission Act Congress was particularly concerned with the situation in which consumers are misled as to the consequences of using a product to the detriment of their health or safety. (Cf. Handler, The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Prob. 91, 102 (1939).)

Other products besides foods, drugs, devices and cosmetics, as those terms are defined for purposes of the food and drug sections of the Trade Commission Act (see sections 15 (b)–(e)), are used in intimate contact with the human body, or otherwise involve serious possibilities of danger to human life, health or safety. The special jurisdictional and remedial provisions of the food and drug sections (see sections 12–14) do not of course apply to the advertising of such products, but the standard of lawfulness embodied in section 15(a)(1), insofar as it expresses a general principle of false and deceptive advertising, is fully applicable in a section 5 proceeding. In the only case in which the question of whether cigarettes are subject to the food and drug sections has arisen (F.T.C. v. Liggett & Myers Tobacco Co., 108 F. Supp. 573 (S.D.N.Y. 1952), aff'd mem., 203 F. 2d 956 (2d Cir. 1953)), the court, while holding that they are not, in no way suggested that a seller of cigarettes (or of any other product which, though technically not a food, drug, device or cosmetic, is intended to be used in intimate contact with the human body) is not subject to the duty to disclose the consequences of using his product in circumstances where failure to disclose such consequences would be deceptive.[83] It is at all events clear that, in enacting the Wheeler-Lea provisions to deal specifically with certain products, Congress did not intend thereby to limit the full development of the law of deceptive acts and practices under section 5. Thus, while labeling is expressly excluded from the food and drug sections, the Commission is free to proceed under section 5 against false labeling of foods, drugs, devices or cosmetics.[84]

4. *The general principle of seller's duties with respect to the marketing of dangerous products.* As has been stated, whether an act or practice is an unlawful decepiton within the meaning of Section 5 may depend upon whether normal use of the product involves dangers to human life, health or safety. The principle is not limited to the nondisclosure area. It also has relevance to determining whether affirmative claims or representations in advertising rise to the level of unlawful deception. The seller of a product whose use may cause personal injury is held to a more stringent standard of truthfulness in advertising than other sellers. As to him, the Commission not only may, but must, "insist upon the most literal truthfulness" (Moretrench Corp. v. F.T.C., 127 F. 2d 792, 795 (2d Cir. 1942)), and resolve all ambiguities and interpretive uncertainties against the seller.[85]

There are two reasons for such special treatment. First, the stakes are so much greater. It is one thing to permit an occasional borderline misrepresentation where it appears that only a few consumers are likely to be misled and suffer economic loss thereby. It is altogether more serious to permit the misleading of even the few, where those who are misled may, in consequence, be injured in their persons as well as their pocketbooks. Second, while consumers may perhaps discount a certain amount of exaggerated and distorted advertising in the case of

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[81] See also Aronberg v. F.T.C., 132 F. 2d 165 (7th Cir. 1942); Sebrone v. F.T.C., 135 F. 2d 676 (7th Cir. 1943); National Bakers Services, Inc. v. F.T.C., —— F. 2d —— (7th Cir. 1964).

[82] For decisions applying this aspect of Section 15, see, e.g., Ultra-Violet Products Co. v. F.T.C., 143 F. 2d 814 (9th Cir. 1944); American Medicinal Products, Inc. v. F.T.C., 136 F. 2d 426 (9th Cir. 1943); Lanolin Plus, Inc., F.T.C. Docket 8150 (decided September 12, 1962).

[83] The ground of the Liggett & Myers decision was that on the basis of the language of section 15 (which defines the products subject to the food and drug sections very narrowly) and what skimpy legislative history there was on the question, as well as the Commission's failure for many years after passage of the Act to suggest that cigarettes were subject to the food and drug sections, it was the likelier inference that the Congress that enacted the Wheeler-Lea Act did not intend that cigarettes be subject to those sections. The basis for Congress' position on this point is not entirely clear; probably in 1938 the need for regulation of cigarette advertising was considered slight. It should be borne in mind that the food and drug sections of Wheeler-Lea do much more than merely set out a test of unlawfulness; they also empower the Commission to seek a preliminary injunction, impose criminal penalties, and broaden the Commission's jurisdiction over sellers of the subject products. Congress may have felt, for one reason or another, that cigarette advertising should not be subject to these special provisions. And, assuming it is correct, the Liggett & Myers decision—rendered, significantly, in a suit by the Commission for a preliminary injunction—does no more than confirm that the Commission cannot invoke these special provisions against cigarette advertisers. (It should be noted, however, that cigarettes have been held to be "drugs" if they are represented as having therapeutic powers. United States v. 46 Cartons of Fairfax Cigarettes, 113 F. Supp. 336 (D.N.J. 1953).)

[84] See Houbigant, Inc. v. F.T.C., 139 F. 2d 1019 (2d Cir. 1944); Fresh Grown Preserve Corp. v. F.T.C., 125 F. 2d 917, 919 (2d Cir. 1942); Mary Muffet, Inc. v. F.T.C., 194 F. 2d 504 (2d Cir. 1952) (per curiam).

[85] See Murray Space Shoe Corp. v. F.T.C., 304 F. 2d 270 (2d Cir. 1962); Country Tweeds, Inc. v. F.T.C., 326 F. 2d 144, 148 (2d Cir. 1964). Cf. United States v. 95 Barrels of Vinegar, 265 U.S. 438, 443 (1924). "Advertisements which are capable of two meanings, one of which is false, are misleading." Rhodes Pharmacal Co. v. F.T.C., 208 F. 2d 382, 387 (7th Cir. 1953), rev'd on other grounds, 348 U.S. 940 (1955) (per curiam).

ordinary products, they are not likely to expect and be prepared to cope with loose advertising practices in the area of health and safety. People have a right to, and by and large do, expect that advertising will be completely truthful in circumstances where the consequences of an untruth, half-truth, or ambiguity may be personal injury. Because they expect fair dealing in the advertising of such products, their guard is down.

An example of the higher standards of candor and honesty in advertising which Section 5 requires in the area of what may broadly be termed "dangerous products" is furnished by the problem of unsubstantiated, but not necessarily false, claims. Not only is it a deceptive act or practice to make a false claim, but, in a situation where the consumer's reliance on the advertiser's claim might result in personal injury if the claim were false, it is also, and independently, deceptive and unlawful to fail to substantiate the truth of the claim in advance. As the Commission stated recently:

> * * * [A]n advertiser is under a duty, before he makes any representation which, if false, could cause injury to the health or personal safety of the user of the advertised product, to make reasonable inquiry into the truth or falsity of the representation. He should have in his possession such information as would satisfy a reasonable and prudent businessman, acting in good faith, that such representation was true. To make a representation of this sort, without such minimum substantiation, is to demonstrate a reckless disregard for human health and safety, and is clearly an unfair and deceptive practice.
>
> That this is so is evident from basic principles governing the law of false and misleading representations. One who affirmatively advertises a product to be safe, in a context in which the prospective user's health or safety may be adversely affected if the claim is false, implicitly represents that he has a reasonable and substantial foundation in fact for making the claim. Consider the case of an advertisement for a sunburn oil which states that the product will absolutely prevent painful sunburn, no matter how prolonged the user's exposure to the sun. The purchaser of this product would certainly be surprised and dismayed to find that the advertiser had made such a claim without having solid reason to believe it to be true. Purchasers believe that where such a claim is made, it has been substantiated in advance; the belief is reasonable and, we think, widespread. It is entitled to the Commission's protection. [Heinz W. Kirchner, F.T.C. Docket 8538 (decided November 7, 1963), pp. 8–9.]

This principle has been applied by the Commission in a case involving cigarette advertising.[56] The Commission held to be false and deceptive a representation by respondent, concerning an alleged improvement in its cigarettes, on the ground that the experimental and other data upon which respondent had relied in making this representation to the public were unreliable and did not justify respondent's making the claim. Respondent's failure to substantiate the claim in advance, not the falsity as such of the claim, was the basis for a finding of deception. The Commission "is not held to higher standards of substantiality or probative value in dealing with respondent than respondent has observed in dealing with the public" (49 F.T.C. at 730). We note that at the public hearings in the present matter the spokesman for the cigarette industry conceded the validity of the principle under discussion here (R. 83–Z–1).

Two final points should be made on the subject of dangerous products. First, in stating that the Trade Commission Act imposes special requirements with respect to the advertising of such products, we do not, of course, imply that the Commission has been given by Congress a general jurisdiction to protect the health and safety of consumers. The Commission's responsibility is not to control or prevent the sale or use of dangerous products, but to ensure that the advertising of such products is not unfair and does not deceive.

Second, if the scope of the concept of unlawful deception and the requirements of appropriate remedial action may be affected by the hazardous nature of the product involved,[57] clearly they may also be affected by the particular degree of danger involved in using the product. If use of the product involves a risk not only to health or safety, but to life itself, the standard of truthfulness to which the seller must conform is of the highest. Deception with respect to such a product obviously cannot be excused on the ground that only a relatively few consumers would be misled; and consumers are most unlikely to expect any but the very highest standards of honest, truthful, and informative marketing of such a product.

5. *Unfair acts or practices.* The Keppel decision (F. T. C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934)) makes clear that the prohibitions of section 5 of the Trade Commision Act embrace acts, practices, or methods of competition that are neither deceptive or misleading, on the one hand, nor monopolistic or anticompetitive, on the other. The Supreme Court in Keppel held that the merchandising practice challenged by the Commission—the sale of penny candy to children by lottery methods—unfairly exploited consumers to the prejudice of respondent's competitors, who were under strong moral compulsion not to engage in the practice, and was therefore proscribed by section 5. The Wheeler-Lea amendments to the Trade Commission Act, passed subsequently to the Keppel decision, eliminated prejudice to competitors as a prerequisite to the Commission action under section 5. The amendments did not of course reject, but, rather, approved and codified, the principle of Keppel—that certain merchandising practices are forbidden by section 5 even though they are neither deceptive nor anticompetitive. That principle is embodied in the provision of section 5, added by the Wheeler-Lea Act, that forbids "unfair * * * acts or practices in commerce."[58]

It is not possible to give an exact and comprehensive definition of the unfair acts or practices proscribed by Section 5 as amended. The Court in Keppel assumed that the practice challenged in that case did not involve fraud or criminality. It further emphasized that the practice was not beyond the reach of the Commission merely because it did not fall within established categories of immoral or unlawful marketing methods. The Court did, however, state that the practice was one which competitors of the respondent were "under a powerful moral compulsion not to adopt" (291 U.S., at 313), and that it was "unscrupulous" (ibid.).

An idea of the broad scope of the concept of unfair acts or practices may be gathered from a consideration of the marketing methods which the Commission has in the past forbidden as unfair but which involve neither false-advertising nor restraint-of-trade principles. These methods include: bribery of a customer's employees ("commercial bribery")[59] and "payola";[60] inducing purchases by coercion, intimidation, and false disparagement of competitors' goods—e.g., by "scare tactics";[61] harassment of competitors and appropriation of the results of their efforts;[62] inducing breach of competitors' contracts;[63] enticing or inciting competitors' employees;[64] physical interference with competitors' goods or properties ("lifting" competitors' goods from dealers or consumers, destroying competitors' catalogs, removal of manufacturers' names from products, etc.);[65] unfair acquisition of competitors' trade secrets, e.g., by es-

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[56] Philip Morris & Co., Ltd., 49 F.T.C. 703, 730 (1952), vacated on appeal on motion of Commission, 5 F.T.C. Statutes and Court Decisions 790 (D.C. Cir. 1953), complaint dismissed on affidavit of abandonment, 51 F.T.C. 857 (1955). Cf. R. J. Reynolds Tobacco Co., 46 F.T.C. 706, 727 (1950), modified on other grounds, 192 F. 2d 535 (7th Cir. 1951); Handler, The Control of False Advertising Under the Wheeler-Lea Act, supra, at 110.

[57] Compare the Federal Hazardous Substances Labeling Act, enacted in 1960. 15 U.S.C. sections 1261–73, in which Congress has given explicit recognition to the special need for stringent labeling requirements in the area of dangerous products. The Act does not regulate the advertising of such products, however.

[58] If a practice both exploits consumers unfairly and injures competitors, it will be—as in Keppel—an unfair method of competition, as well as an unfair act or practice.

[59] See, e.g., F.T.C. v. Grand Rapids Varnish Co., 41 F. 2d 996 (6th Cir. 1929); Handler, Unfair Competition and the Federal Trade Commission, 8 Geo. Wash. L. Rev. 399, 408–09 (1940).

[60] See, e.g., Bernard Lowe Enterprises, Inc., 59 F.T.C. 1485 (1961).

[61] See, e.g., Holland Furnace Co. v. F.T.C., 295 F. 2d 302 (7th Cir. 1961); Dorfman v. F.T.C., 144 F. 2d 737 (8th Cir. 1944); Lane v. F.T.C., 130 F. 2d 48 (9th Cir. 1942); Zlotnick the Furrier, Inc., 48 F.T.C. 1068 (1952).

[62] See, e.g., Independent Directory Corp. v. F.T.C., 188 F. 2d 468 (2d Cir. 1951); Directory Publishing Corp. v. F.T.C., 208 F. 2d 632 (2d Cir. 1953); Chamber of Commerce of Minneapolis v. F.T.C., 13 F. 2d 673 (8th Cir. 1926).

[63] See, e.g., Carter Carburetor Corp. v. F.T.C., 112 F. 2d 722 (8th Cir. 1940); Kalwajtys v. F.T.C., 237 F. 2d 654 (7th Cir. 1956).

[64] See, e.g., Cook-Master, Inc., 46 F.T.C. 532 (1950); Darling & Co., 30 F.T.C. 739 (1940).

[65] See, e.g., Hastings Mfg. Co. v. F.T.C., 153 F. 2d 253 (6th Cir. 1946); American Greetings Corp v. United States, 49 F.T.C. 440 (1952); Waldes & Co., 8 F.T.C. 305 (1925).

pionage;[96] push money;[97] failure to fill orders promptly and shipment of unordered goods ("padding");[98] wrongful forcing of deals or payments, e.g., by false threats to sue;[99] substitution of inferior goods;[100] and, of course, distribution of merchandise through lottery devices.[101]

Focusing on acts or practices which have been forbidden primarily because of their unfairness to consumers, rather than to competitors, we should mention, as further examples: refusals to deliver (E. T. Moye, 50 F.T.C. 926 (1954)) or to return goods kept for repair (Interstate Home Equipment Co., 40 F.T.C. 260 (1945)); wrongfully delayed delivery of purchased goods (Associated Trade Press, Inc., 46 F.T.C. 58 (1949)); extorting releases from liability (Holland Furnace Co., 55 F.T.C. 55 (1958), aff'd, 295 F. 2d 302 (7th Cir. 1961)); shipping unordered goods in order to induce purchase by mistake (Norman Co., 40 F.T.C. 296 (1945)); concealing seller's identity to obtain repeat orders (Folding Furniture Works, Inc., 34 F.T.C. 921 (1942)); wrongful refusals to return deposits (Interstate Home Equipment Co., supra) or make refunds (Zlotnick the Furrier, Inc., 48 F.T.C. 1068 (1952)); and threatening suit where no money is actually due (Dorfman v. F.T.C., 144 F. 2d 737 (8th Cir. 1944)).

No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but the examples should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others. Beyond this, it is difficult to generalize.

In the last analysis, the Commission's responsibility in this area is to enforce a sense of basic fairness in business conduct. For while Section 5 "does not authorize regulation which has no purpose other than * * * censoring the morals of business men" (F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 313 (1934)), the Commission cannot shirk the difficult task of defining and preventing those breaches of the principles of fair dealing that cause substantial and unjustifiable public injury.

V. The Requirements of the Federal Trade Commission Act With Respect to the Marketing of Cigarettes, in Light of the Health Hazards of Smoking

Section 5 of the Federal Trade Commission Act requires scrupulous adherence to the standards of fairness, accuracy, and full disclosure in the marketing of cigarettes (see Parts II and IV, supra). It is all the more imperative to hold cigarette manufacturers to the duty of fair and non-deceptive marketing in view of the evident attractiveness of cigarette smoking to children and teenagers, and the fact that it is habit-forming.

In this part of the report our concern is to define and particularize, in light of the health hazards of smoking, the requirements of Section 5 with respect to the marketing of cigarettes. In attempting to delineate the lawful bounds of cigarette merchandising, however, we do not mean to suggest or imply that past or current practices of the cigarette industry have violated or are violating any statute administered by the Commission, except insofar as such practices may have been determined to be unlawful in adjudicative proceedings under section 5(b). (See note 3, supra). The present trade regulation rule proceeding is not a proper vehicle for determining whether violations of law have occurred (see Part VI, infra). The concern of the present proceeding is with the future, not the past—with how, in light of the Report of the Surgeon General's Advisory Committee, and other pertinent data and materials, the cigarette industry may now avoid violation of the Trade Commission Act. There is no purpose here to impute guilt or innocence in respect of past practices.

A. *Affirmatively deceptive advertising.* Outright false statements in advertising or labeling respecting the healthfulness or safety of smoking cigarettes or smoking the advertised brand are, of course, unlawful; they require no discussion. But quite apart from explicit misstatements, section 5, as has been demonstrated in the preceding part of this report, forbids a seller to create a false impression in the mind of the consumer through suggestions, insinuations, misleading statements of opinion or exaggerations, deceptive half-truths, innuendo, and other indirect techniques.

Two problems of indirect deception require particular attention in considering the lawful bounds of cigarette advertising. The first is the problem of the unsubstantiated, but not necessarily false, claim. Suppose that a cigarette manufacturer were to claim in his advertising, without having in his possession evidence sufficient to establish the truth of the claim, that a new kind of filter eliminated certain harmful ingredients from the cigarette smoke. There would clearly be deception. Most purchasers assume that an advertiser would not make an unsupported claim of product safety.

What quantum of evidence must a cigarette advertiser have in his possession before making such claims? Given the complexity of the technical issues involved in the problem of cigarette smoking and public health, it is doubtful that may such claims would be susceptible of complete proof. To set the standard of advance substantiation at too high a level might, in consequence, preclude the advertising of genuine advances in the safety of cigarette smoking and thereby discourage the development of such products.

The other problem is that of a literally true claim respecting the health consequences of smoking the advertised brand which, nevertheless, is deceptive because of failure to disclose material facts that qualify and explain the claim. Suppose that an advertiser truthfully states that his cigarettes contain no argon. Without further elaboration, many consumers would assume that the elimination of such an ingredient lessened the hazards of smoking the brand—else why would the advertiser make such a claim? The impression created by such an advertisement will be false if, for example, there is a lack of substantial evidence that the elimination of argon lessens the hazards of smoking. That material qualifying fact must be disclosed in order to dispel the false impression created by the claim standing alone.

Consumers would also be deceived, we believe, by claims relating to the amount of the ingredients (e.g., tar and nicotine) present in the cigarette smoke, unless such claims have been verified in accordance with a fully uniform testing procedure. An advertiser who stated that his cigarettes contained only 5 milligrams of tar might be describing accurately the test results he had obtained. Yet advertising these results could create a false impression of the relative hazards of smoking the brand, and be unfair to competitors, if the advertiser were using a testing procedure that yielded, on the same cigarette, a lower tar count than the testing procedure used by other manufacturers as the basis of their advertising of tar content.

In order to prevent deception in an area of substantial health hazards where

[96] See, e.g., Philip Carey Mfg. Co. v. F.T.C., 29 F. 2d 49 (6th Cir. 1928); Oakes Co., 3 F.T.C. 36 (1920).

[97] See, e.g., Kinney-Rowe Co. v. F.T.C., 275 Fed. 665 (7th Cir. 1921).

[98] See, e.g., Rushing v. F.T.C., 320 F. 2d 280 (5th Cir. 1963); Dorfman v. F.T.C., 144 F. 2d 737 (8th Cir. 1944); Consumers Home Equipment Co. v. F.T.C., 164 F. 2d 972 (6th Cir. 1947) (per curiam); Norman Co., 40 F.T.C. 296 (1945); Folding Furniture Works, Inc., 34 F.T.C. 921 (1942); Associated Trade Press, Inc., 46 F.T.C. 58 (1949).

[99] See, e.g., Holland Furnace Co. v. F.T.C., 295 F. 2d 302 (7th Cir. 1961); Trade Union Courier Publishing Co. v. F.T.C., 232 F. 2d 636 (3d Cir. 1956); United States Stationery Co., 49 F.T.C. 745 (1953).

[100] See, e.g., National Trade Publications, Inc. v. F.T.C., 300 F. 2d 790 (8th Cir. 1962); Interstate Home Equipment Co., 40 F.T.C. 260 (1945).

[101] See, e.g., F.T.C. v. George Ziegler Co., 90 F. 2d 1007 (7th Cir. 1937); National Candy Co. v. F.T.C., 104 F. 2d 999 (7th Cir. 1939); Douglas Candy Co. v. F.T.C., 125 F. 2d 665 (8th Cir. 1942); Surf Sales Co. v. F.T.C., 259 F. 2d 744 (7th Cir. 1958); Rosten v. F.T.C., 263 F. 2d 620 (2d Cir. 1959); Lichtenstein v. F.T.C., 194 F. 2d 607 (9th Cir. 1952).

highly technical medical and scientific considerations may make literally true claims nevertheless misleading, uniform testing methods should be used as the basis of, and all material qualifying facts should be disclosed in, advertising of claimed improvements in the safety of cigarette smoking.

B. *The seller's duty to disclose the health hazards of cigarette smoking.* 1. *General principles.* Part IV of this report reviewed the various circumstances in which Section 5 of the Federal Trade Commission Act may require an advertiser to disclose material facts in marketing his product. It was pointed out that under well-established principles this duty might arise either because of past or present affirmative representations by the seller, requiring affirmative disclosure of additional facts in order to dispel a false impression created in the mind of the consumer, or, even in the absence of any affirmative representations, because nondisclosure was deceptive in light of the appearance, nature, or intended use of the product. Specifically, it was noted that the seller of a product involving dangers in its use might be required to disclose the existence of such dangers to the consumers.[102]

(a) *The Dangerous-Products Principle.* Cigarettes are a product designed for use, and are used, in intimate contact with the human body—as intimate, certainly, as any food or drug—and it is well established, in a long line of Commission decisions, that the normal expectations of consumers of such products (whether a food, a drug, or other) is that they are safe under normal conditions of use. If they are not safe under such conditions but this fact is not disclosed, the consumer is deceived and the seller is guilty of unlawful deception. Cigarettes are not safe under normal conditions of use. Although the degree of risk may vary, a hazard to health exists for every smoker, whether he be a "moderate" smoker of a pack a day, a "light" smoker of less than a pack a day, or a "heavy" smoker. A seller's failure to disclose the health hazards of smoking is, therefore, a deceptive act or practice proscribed by Section 5.

(b) *The "Deceptive Half-Truth" Principle.* Most cigarette advertising—and certainly the vast bulk of all such advertising in the mass media—does not merely direct attention to the name of the brand (in contrast to cigarette labeling, which ordinarily contains little but the brand name), or limit itself to representations unrelated to the experience of cigarette smoking (e.g., premium or price offers). In the cigarette industry, advertising has actively stimulated demand for the advertised brand by portraying cigarette smoking in general and the smoking of the advertised brand in particular as a satisfying, desirable, and attractive activity.

Such advertising has associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness, recreation, relaxation, comfort, and sophistication, at the same time suggesting that smoking is an activity at least consistent with physical health and well-being. Furthermore, cigarette advertising has frequently intimated, without claiming outright, that smoking or smoking the advertised brand is innocuous or at least less hazardous than smoking other brands. Cigarette advertising has thus stressed the claimed satisfactions of smoking while ignoring completely—or even attempting to negate—the dangers of the habit.

It is a deceptive act or practice for an advertiser to make representations concerning the satisfactions to be derived from using so hazardous a product as cigarettes without, at the same time, disclosing the dangers to health involved in its use. Even if the cigarette manufacturer does not claim or suggest that smoking cigarettes or smoking the advertised brand is harmless or healthful, or less hazardous than smoking other brands, in affirmatively representing the smoking habit as attractive and satisfying he is fostering an impression of safety in the minds of many consumers. The image of smoking projected in the typical cigarette advertisement is of a pleasant and happy activity. That image is inconsistent with and misrepresents the complete truth about smoking, which is that while it may afford pleasure, it is a habit difficult to break and extremely dangerous to life and health. To avoid giving a false impression that smoking, because it may be pleasant and satisfying, is therefore innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves.

This principle is applicable a fortiori to cigarette advertising that not only stresses the satisfactions of smoking, but makes a positive attempt to allay the consuming public's fears or anxiety with respect to the dangers of smoking by representing or implying that smoking the advertised brand is or may be harmless or less harmful than smoking other brands. Quite apart from its failure to disclose the hazards of smoking, much advertising of this sort probably is at least on the borderline of deception. But even a completely truthful such claim—referring, let us suppose, by way of a hypothetical example, to a genuine and substantial improvement in the safety of smoking the advertised brand—is likely to deceive many consumers unless there is disclosure of the hazards of smoking. Where such claims are made, disclosure is required to dispel any impression that because the advertised brand incorporates certain safety features or improvements, or contains fewer harmful ingredients than other brands, it is therefore safe.[103]

In short, although advertising claims respecting the satisfactions of smoking or respecting health or the safety features of a particular brand are not necessarily untruthful in themselves, standing alone they are at best half-truths. They may be literally true, yet they are still likely to convey the false impression that cigarette smoking is not dangerous to human life and health. The disclosure of the hazards of smoking is necessary to correct a deceptive half-truth.

Cigarette advertising of the kind described above (i.e., advertising that lays heavy stress on the satisfactions of smoking and frequently attempts to negate the dangers of smoking—but never discloses those dangers) has for many years dominated, and continues to dominate, the industry. Its volume has been very great. Advertising so intensive and long-continued throughout an entire industry is bound to create and has created a powerful impression—in this case one of smoking as a satisfying, pleasurable, and perhaps even indispensable activity which is consistent, at least, with physical health and well-being. That impression is now firmly lodged in the minds of the consuming public.

The principle thus comes into play that an advertiser may be obliged to disclose a material fact about his product not only in order to correct the false impression engendered by current advertising that omits to disclose the fact, but also to cure the ill effects of former advertising practices. In view of the strong impression built up in the public mind by a decade of especially massive cigarette advertising, it is likely that current or future such advertising, even if it refrains

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[102] The cigarette manufacturer, as a supplier of goods, is under a common-law duty to exercise reasonable care to assure that goods placed on the market are safe (Prosser, Torts § 83 (2d ed. 1955)); and where goods are inherently dangerous, there is a common-law duty to warn, in advertising and labeling, of known dangers. Ibid.; Dillard & Hart, Directions for Use and the Duty to Warn, 41 Va. L. Rev. 145 (1955). The Restatement of Torts, § 388 (1934), also takes this view:

"One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows, or from facts known to him should realize that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

The law of products liability is in process of development toward the day when the seller of any product who sells it in a condition dangerous for use will be held strictly liable to the ultimate user for injuries resulting from such use, even though the seller has exercised all possible care, and the user has entered into no contractual relation with him. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L. J. 1099, 1112 (1960); Restatement (Second), Torts, § 402A (Tent. Draft No. 7, approved May 1, 1961).

[103] Compare the decisions forbidding unqualified representations that a drug affords "relief" from a condition on the ground that such representations falsely imply curative powers. F.T.C. v. Rhodes Pharmacal Co., 348 U.S. 940 (1955) (per curiam), rev'g 208 F. 2d 382 (7th Cir. 1953); Aronberg v. F.T.C., 132 F. 2d 165 (7th Cir. 1942); D.D.D. Corp. v. F.T.C., 125 F. 2d 679 (7th Cir. 1942); American Home Products Corp., F.T.C. Docket 8478 (decided September 27, 1963).

from affirmative claims concerning the experience of smoking, cannot avoid exploiting and reinforcing that impression.

In this industry, clearly, advertising has had the function of persuading the consumer of the pleasure and satisfactions of smoking cigarettes. Advertising has been the principal vehicle of the sales message. In view of the role of advertising in the cigarette industry, it is important that cigarette advertising be free of any false impression of the product's safety arising from what is omitted as well as what is stated or implied.

2. *The seller's duty of disclosure arising from the nature of modern mass advertising.*—This section deals with another basis for promulgation of the trade regulation rule, derived from considerations of both deception and unfairness under section 5, but which perhaps fits neither of these categories, as conventionally interpreted, precisely.

In the area of consumer protection section 5 confers on the Commission a broad mandate to proscribe acts or practices which exploit the consumer and impair his freedom to choose among available products. The sale of cigarettes without disclosure of the health hazards of smoking has such effects, and is therefore unlawful, not only for the reasons already stated but for additional reasons having to do with the special conditions of modern marketing.

The bedrock common-law and section 5 principles of consumer protection reflect, for the most part, marketing practices of an earlier period in the nation's economic development. There was a time when the sale of consumer products was, far more than it is today, a matter largely of face-to-face persuasion by the seller and, in advertising and labeling, of direct, detailed and explicit claims for the quality or merits of his product. Today, however, most consumer products are mass-produced and highly standardized; and the techniques of mass communication by seller to consuming public have been perfected. New sales methods have, accordingly, come to the fore. The phenomenon under scrutiny in this proceeding—the advertising of the cigarette industry, mostly in the mass media, on a scale of expenditure of more than $200,000,000 a year—differentiates the present problem from the traditional problems of false and misleading advertising.

In the conventional false and misleading advertising case, it is not unusual to consider the challenged advertisement apart from the respondent's—and the industry's—total advertising. This is a satisfactory procedure where the source of public injury or consumer exploitation lies essentially within the four corners of the advertisement, in the claims made or facts left undisclosed. It is less satisfactory where the cumulative effect of massive and long-continued advertising throughout an entire industry, in contrast to the effect of a single advertisement or particular advertisements, is itself a source of substantial and unjustifiable injury to the consuming public.

Part III of this report contains an analysis of cigarette advertising in relation to the consumption of cigarettes and the dissemination of evidence of the grave health hazards of cigarette smoking, for the period since concern with those hazards first became acute. Certain facts emerge from this analysis. Cigarette advertising, concentrated in the media having the widest consumer exposure, has increased rapidly and continuously in the decade since concern with the hazards of smoking first reached significant proportions. Considered as a whole, such advertising has emphatically and persistently driven home, in the minds of its vast audience, the pleasure and desirability of cigarette smoking. Further, it has frequently implied that smoking or smoking the advertised brand is harmless or relatively harmless to the health of the individual. The net effect of this advertising—its magnitude and content—has been to help maintain cigarette consumption at a high and rising level despite the increasingly patent dangers of the habit. While thus spending hundreds of millions of dollars to iterate and reiterate that smoking is attractive and satisfying and to allay anxiety on the score of the hazards of smoking, the cigarette manufacturers have made no effort whatever, and have spent nothing, to inform the consuming public of the mounting and now overwhelming evidence that cigarette smoking is habit-forming, hazardous to health, and once begun, most difficult to stop. On the contrary, the cigarette manufacturers and the Tobacco Institute have never acknowledged, and have repeatedly and forcefully denied, that smoking has been shown to be a substantial health hazard.[104]

The cigarette industry's massive, continuous, mounting, and forceful advertising, coupled with the refusal to acknowledge or take any steps to inform the consuming public of the hazards to health, has blunted public awareness and appreciation of these hazards and has tended to maintain demand for the product in the face of growing public concern. Not only has the industry failed to disclose to the consuming public the dangers of cigarette smoking; its past and present advertising has camouflaged them. The cumulative effect of at least a decade of massive cigarette advertising has been to establish a barrier to adequate public knowledge and appreciation of the health hazards. Modern mass-media advertising on the scale conducted by the cigarette industry is a form of power in the market place—power over the buying choice of consumers. It is lawful power. But just as the possession of lawfully-acquired market or monopoly power in the antitrust sense may nevertheless place a firm under a special duty of fair dealing toward its competitors,[105] an advertiser's possession of great power vis-a-vis consumers may place him under a special duty of fair dealing toward them, especially where the advertised product is dangerous to life and health. The duty exists even if no individual advertisement, viewed in isolation, is deceptive under conventional principles. The cigarette industry's duty of fair dealing with the public is not avoided by the efforts of groups such as the American Cancer Society to educate the public in the health hazards of cigarette smoking. On the contrary, the duty arises precisely because of the tendency of the industry's advertising to neutralize the impact of such educational efforts.

The findings made in Part III of this report justify and indeed compel the inference that, deception to one side, cigarette advertising, by virtue of its magnitude, techniques, content, media, and other factors, and above all by its failure to disclose the dangers of smoking, is unfair to the public and consequently (should it continue in the future in its present form, i.e., without any disclosure of the dangers of smoking) unlawful under Section 5.

3. *The protection of youth from unfair or deceptive cigarette advertising and labeling.* The law has always evinced special regard for protecting the young.[106] "The infant has always been a favorite of the law. From early times the common law has made exceptions to the ordinary rules of law to compensate for the mental immaturity of persons in the adolescent period of life. The infant has been given certain special rights and privileges, and at the same time has had imposed upon him certain disabilities, all intended to afford him special protection."[107] Of particular applicability here is the established principle that:

> One who supplies * * * a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself * * * is subject to liability for bodily harm caused thereby to them. [Restatement of Torts § 390 (1934).]

In the interpretation of Section 5 of the Trade Commission Act, the Federal

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[104] See, e.g., H.R. Rep. No. 1372, False and Misleading Advertising (Filter-Tip Cigarettes), 85th Cong., 2d Sess. 23 (1958); Neuberger, Smoke Screen: Tobacco and the Public Welfare, ch. 2 (1963).

[105] See, e.g., Associated Press v. United States, 326 U.S. 1 (1945); United States v. Terminal R.R. Assn., 224 U.S. 383 (1912); United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954).

[106] A famous example is the "attractive nuisance" doctrine of tort law. See, e.g., Sioux City & Pac. R. Co. v. Stout, 17 Wall. 657 (U.S. 1873); Keffe v. Milwaukee & St. Paul R. Co., 21 Minn. 207 (1875); United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1921); Ekdahl v. Minnesota Utilities Co., 203 Minn. 374, 281 N.W. 517 (1938); McKiddy v. Des Moines Elec. Co., 202 Iowa 225, 206 N.W. 815 (1926); Bartleson v. Glen Alden Coal Co., 361 Pa. 519, 64 A. 2d 846 (1949); Restatement of Torts § 339 (1934); Prosser, Torts 438-45 (2d ed. 1955). Mr. Justice Holmes described the doctrine in the following terms: "knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult." United Zinc & Chem. Co., supra, at 275. However, this is probably too restrictive a statement of the doctrine in its present form. See Prosser, op. cit. supra, at 440.

[107] 5 Vernier, American Family Laws 3 (1938). See Ellis, Basic Aspects of Legal Incapacity, 1951 U. Ill. L. F. 189 (1951).

Trade Commission early recognized the need to afford special protection to children. In F.T.C. v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934), the Supreme Court emphasized the immature judgment of children in upholding the Commission's prohibition of the sale of penny candies by lot or chance. The Court stated:

> * * * [T]he method of competition adopted by respondent induces children, too young to be capable of exercising an intelligent judgment of the transaction, to purchase an article less desirable in point of quality or quantity than that offered at a comparable price in the straight goods package. * * *[Id., at 309.]
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> It is true that the statute [Section 5] does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. * * * It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair." [Id., at 313.]

The credulity and immaturity of children, and the consequent need to give them special protection from exploitive marketing practices, were recognized by the Commission in its recent decision in Wilson Chemical Co., Inc., F.T.C. Docket 8474 (decided January 14, 1964), where the respondent salve manufacturer, by the use of misleading and deceptive advertisements, recruited children and adults to sell its salve, and thereafter, by the employment of a system of threatening and deceptive collection letters, coerced payment for the salve from the children and adults to whom the salve had been sent as the result of the deceptive advertising. In discussing the coercive nature of respondents' dunning letters, the Commission stated (p. 5): "They are strong letters to send to adults. *Their coercive nature is increased when it is considered that in the majority of cases the recipients of these letters are probably children.*" (Empasis added.) So also, in dealing with the marketing of toys the Commission has recognized that special standards of truthful and non-deceptive advertising must be observed. See, e.g., Ideal Toy Corp., F.T.C. Docket 8530 (decided January 20, 1964), p. 2.

Thus, throughout the law in general and under Section 5 of the Trade Commission Act in particular, it has been recognized that minors constitute an especially vulnerable and susceptible class requiring special protection from business practices that would not be unlawful if they only involved adults. Accordingly, a marketing practice, directed in a substantial part toward minors, that interferes substantially and unjustifiably with their freedom of buying choice is an unfair or deceptive act or practice even if it is not especially pernicious as to adults. Thus, cigarette advertising or labeling that does not disclose the health hazards of cigarette smoking may be independently unlawful under Section 5—quite apart from the grounds previously advanced—because it "exploit[s] consumers, children, who are unable to protect themselves." F.T.C. v. R. F. Keppel & Bro., Inc., supra, at 313. This conclusion rests on the concurrence of a number of factors.

The first is the attractiveness of the product to children and teenagers. While the causes of cigarette smoking are not as yet perfectly understood, it seems clear that smoking has some relation to the stresses and strains of adolescence, and is attractive and desirable to many adolescents as a way of asserting their independence, conforming to their peers, and emulating adult behavior, and for other social and psychological reasons.[108] These emotional factors make many children and teenagers predisposed to smoke and hence susceptible to the inducements contained in cigarette advertising, and inhibit their ability to appreciate and weigh the objective factors that ought to enter into a decision as to whether to smoke, among them the health hazards of cigarette smoking. Cigarettes may be analogized to the "attractive nuisance" of tort law (see note 106, supra). Children and teenagers are drawn to them for powerful, but emotional rather than rational, reasons, which interfere with the exercise of judgment and reason.

A second critical factor is the availability of cigarettes to children and teenagers. Although there are laws regulating the sale of cigarettes to minors, it is apparent that even where such laws constitute a theoretically effective prohibition of sales to minors (and it should be noted that in many parts of the nation cigarettes may lawfully be sold to teenagers and even children[109]) they are not effectively enforced.[110] In fact, as we have seen, a very large number not only of teenagers but of children as well smoke, often heavily.[111] Because cigarettes are readily obtainable, and indeed widely consumed, by youngsters, the effect of advertising inducements on them cannot be dismissed or ignored. As the Report of the Surgeon General's Advisory Committee states, "the years from the early teens to the ages of 18–20 are significant years in exposing people to their first smoking experiences. * * * All available knowledge points towards the years from the early teens to the age of 20 as a significant period during which a majority of later smokers began to develop the active habit." (ACR 362, 368.) The importantance of ensuring that cigarette advertising be completely fair and nondeceptive to people in this age bracket is obvious.

A third factor to be considered is the nature of the danger. Two points should be made in this connection. On the one hand, the risk to health and life is greatest, as the Report of the Surgeon General's Advisory Committee expressly found, for those who begin to smoke before the age of 20.[112] This finding under-

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[108] See, e.g., R. 153–54; bibliography in Advisory Committee's Report, pp. 377–79. The Advisory Committee concluded:

"There is suggestive evidence that early smoking may be linked with self-esteem and status needs although the nature of this linkage is open to different interpretations." (ACR 376.)

Elsewhere it stated:

"At present, there is persuasive, but not convincing evidence that smoking among adolescents may in many cases be related to needs for status among peers, self-assurance, and striving for adult status." (Id., at 373.)

[109] A survey of state laws regulating the sale of cigarettes to minors discloses that only a few states forbid the sale of cigarettes to minors under 21, while many forbid their sale only to minors under 18 or 16 and some have no prohibition at all against sales of cigarettes to minors.

[110] See Report of the Special Committee of the New York State Senate on Smoking and Health 9 (1964) (Ex. 446). See also, e.g., Exs. 434, 435.

[111] The prevalence of smoking among youth of various ages is documented in Part III of this report. The Report of the Advisory Committee, pp. 361–62, states: "At the 12th grade level, between 40 to 55 percent of children have been found to be smokers." It also states, "More recent but limited data suggest that there has been an increment in smoking prevalence at all age levels since the early fifties" (Id., at 362); and that it has been estimated "that 10 percent of later smokers 'develop the habit with some degree of regularity' before their teens and 65 percent during their high school years" (Ibid., citing Horn, Behavioral Aspects of Cigarette Smoking, 16 J. of Chronic Dis. 383 (1963)). Dr. Eva Salber found that in Newton, Massachusetts, the average age at which boys smoked their first cigarette was 11.6 (12.7 for girls), and that an average of only 2.1 years elapsed between the first cigarette and the commencement of regular smoking (1.7 for girls). R. 157. The Health Commissioner of New York City reported that more than 60% of the city's junior and senior high school students (ages 11–18) smoke. R. 262. 12% of the boys in junior high school and 5% of the girls smoke more than ½ pack a day. In senior high school, the figures are 41% and 25%. Ibid.

[112] ACR 36. The relationship between the age at which smoking is begun and the danger of smoking is emphasized in a study by Dr. E. Cuyler Hammond and Lawrence Garfinkel. "As described in a previous report, the great majority of men who were current cigarette smokers in 1959–1960 began to smoke cigarettes before they reached the age of 25; and two-thirds of them began before the age of 20; and an appreciable proportion began before the age of 15. In this analysis, it has been found that daily amount of cigarette smoking and the degree of inhalation of the smoke are related to age at start of cigarette smoking. . . . Men who started smoking early in life tend to smoke more cigarettes per day and tend to inhale the smoke more deeply than do men who started smoking later in life. The same pattern is found in other age groups; but it is less pronounced in the older age groups.

"Since both current amount of smoking and degree of inhalation are related to age at start of smoking, it is not surprising that they are related to each other. Men who smoke the most cigarettes per day tend to inhale the smoke to the greatest degree. Very few light smokers inhale deeply while a large proportion of heavy smokers do inhale the smoke deeply.

"The total lifetime exposure of an individual to cigarette smoke is dependent upon years of smoking, number of cigarettes smoked per day, and the degree to which the smoke is inhaled. All three of these variables are related to age at start of cigarette smoking. Thus current cigarette smokers who started the habit early in life have generally had a very much greater total lifetime exposure to cigarette smoke than current cigarette smokers who did not start the habit until later in life." (Ex. 383, Ex. C, pp. 13–14). See also Hammond and Garfinkel, Smoking Habits of Men and Women, 27 J. Natl. Cancer Inst. 419 (1961).

scores the necessity of protecting children and teenagers from unfair or deceptive cigarette merchandising practices to the limits of the Commission's statutory authority.

On the other hand, there is no directly apparent or immediate danger from cigarette smoking. The effects of the habit ordinarily take a number of years to appear. Everyone knows that very young people have a far less acute appreciation of mortality, and danger generally, than adults. Young people perhaps can comprehend immediate, palpable dangers, but the danger of cigarette smoking is to their long-term health, threatening them only with what to them is the remote prospect of premature mortality in middle-age. They are therefore not likely to be able to appreciate the serious risks they are taking in smoking (see, e.g., R. 361; Ex. 26, p. 1). The analogy of the "attractive nuisance" of tort law is again relevant. While the attractions of cigarette smoking are such as to make an immediate and strong appeal on emotional grounds difficult for many young people to resist, the dangers in cigarette smoking are not readily apparent or comprehensible to such persons.

Another critical factor is the habit-forming nature of cigarette smoking. Smoking is a habit difficult to break. The difficulty varies with the particular individual. For many people the choice to smoke, once it has been made, may as a practical matter be irrevocable. A person may begin to smoke—say at the age of 15—on the basis of a completely immature judgment. He may be incapable at that time of appreciating the dangers of smoking. Ten years later he may regret his youthful choice and desire to discontinue the habit, but, depending on his individual make-up, this may be too difficult for him to do.

Finally, the role of cigarette advertising in the youth market must be considered. It has been pointed out that cigarette advertising is strongly concentrated in television, where it reaches a vast audience composed in very substantial part of children and teenagers. Quite apart from the fact that cigarette advertising has on occasion utilized themes which appear to have special appeal for youth, the fact that children and teenagers are exposed to a very substantial amount of cigarette advertising requires that such advertising be fair and non-deceptive as to them. Cigarette advertising does not present a case of the accidental or occasional exposure of an especially susceptible or vulnerable consumer group to advertising mainly directed toward adults. Whether through design or otherwise, cigarette advertising is so placed that its audience is substantially, and not merely incidentally or insignificantly, composed of nonadults. And, as we have seen, such advertising has actively and effectively sought to induce the purchase of cigarettes by heavily stressing the attractions and satisfactions of smoking without disclosing the serious hazards to health.

It is widely believed that advertising is to a significant degree responsible for the prevalence of smoking among the nation's youth. In the words of two doctors of the United States Public Health Service:

> At the present state of knowledge it is impossible to say exactly what role the mass media of communication play in this context. It is unlikely that many adolescents start smoking merely because of the influence of advertisements and commercials. Many might do so even if they were never exposed to such advertisement. However, there are several reasons why the mass media are in fact likely to influence this form of behavior—both with respect to the initiation of the habit and its maintenance. First, we know that in our society a favorable climate of opinion exists which supports smoking behavior. The mass media can be quite effective in reinforcing this general climate since they conspicuously avoid presenting content which is inconsistent with or in opposition to this general climate. This is primarily true of cigarette advertising since it does not present a balanced appeal to the individual with respect to both the favorable and the detrimental effects involved in smoking.
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> In addition, the advertising appeals which seek to promote and reinforce smoking behavior are anchored in an awareness of the fact that individuals tend to see and hear and remember those things which fit in with their basic needs and values and that they are likely to selectively respond or pay attention to material which directly or implicitly relates to these needs. For example, individuals who are concerned about gaining social status or success in their social contacts are likely to respond to those messages which directly or implicitly indicate that the use of the product will serve to promote such goals. Those individuals who are susceptible to this approach—primarily the teenager, are likely to be influenced by such messages. While this may not be the sole factor which determines whether or not an individual initiates the smoking habit and maintains it, it may be quite effective in conjunction with other forces operating upon him.
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> In general, therefore, it can be safely assumed that a large number of individuals who experience some desire to start smoking along with ambivalent feelings about the matter, may be sufficiently influenced by the mass media to induce them to decide one way or another. In this situation the impact of advertisements and commercials may well be decisive in a very large number of cases. The reasons for this opinion are:
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> 1. It is a prevalent view in our society that the Government protects the public against advertisements to promote the sale of dangerous products. The mere fact that advertisement of cigarettes is officially tolerated carries an implication that cigarettes are not considered as serious a health threat as other products not generally tolerated (for example, dope or, for that matter, "hard liquor"). Such an implication is most likely to be influential in the case of persons already inclined, though perhaps still hesitant, to take up smoking.
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> 2. While no single kind of commercial, such as one promoting the sale of one brand of cigarette over another, can be expected to have much influence, the cumulative effect of a constant bombardment by many kinds of cigarette commercials and advertisements is a different matter. Together with smoking heroes and heroines in many TV shows and certain other presentations of a similar nature, it would tend to create a general image of smoking as a typical, if not desirable cultural trait in our society. This would reinforce the social influences toward smoking that may exist among adolescent groups as well as weaken any rational counter arguments.
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> 3. The mere fact that millions of dollars are spent yearly on advertisements for cigarettes reflects a conviction on the part of cigarette manufacturers that such advertisements are effective.[113]

Whether or not the cigarette industry has deliberately attempted to exploit the large and vulnerable youth market, its advertising, in emphatically reiterating the pleasures and attractions of smoking without disclosing the dangers to health, has exercised an undue influence over the large class of youthful, immature consumers or potential consumers of cigarettes.

It is not the Commission's position that all advertising should be judged in terms of a nonadult's standard of comprehension and judgment, but the special factors reviewed above justify special treatment in this regard for cigarette advertising, as for the penny-candy merchandising practices condemned in the Keppel case. Indeed, the nation's advertising media[114] and the cigarette industry are aware that cigarette advertising appealing to youth requires special atention. Of the children and teenagers who, today, have already begun to smoke, many thousands may die prematurely as a result of diseases caused by or associated with cigarette smoking. That may be the result of a choice made at an age when, and with respect to a product as to which, a mature balancing of the benefits and risks of smoking was impossible for them. They will have made this choice after having been exposed to massive advertising constantly reiterating the attractions of smoking without giving any intimation of the

[113] Ex. 216, pp. 1–3 (comments of Drs. Fred Heinzelmann and Godfrey M. Hochbaum concerning the proposed trade regulation rules for the advertising and labeling of cigarettes). See also, e.g., Exs. 26 (p. 2), 53, 54, 58, 65, 73, 78, 91, 94, 99, 100, 109, 110(a), 134, 181, 188, 216, 257, 272, 318(h), 335, 356, 359(a), 432, 514. The Commissioner of Health of the City of Minneapolis has stated:

> "I am convinced that no serious inroads can be made into the matter of reducing cigarette consumption in this country until the massive, frightening and overwhelming impact of television advertising beamed at immature youngsters can be curtailed. Adults of middle age and above can carry their own responsibility for their bad habits since the publicity to date certainly has been adequate. The 13 year old school child, on the other hand, cannot properly evaluate the scientific evidence, nor is he particularly amenable to advice, caution, and threats on the part of the older people whether they be parents or school authorities. If we could only diminish the incessant bombardment of advertising on such children I think this would be much more effective than all the parental lecturing and school propaganda that the adult world can bring to bear upon them." [Ex. 134.]

[114] The Television Code Review Board of the National Association of Broadcasters recommended the following amendments to the Code: "Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation"; "The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country." Ex. 283, Ex. A, p. 2.

hazards involved. The Commission concludes that the standard of conduct defined in the trade regulation rule is required by Section 5 of the Trade Commission Act for the protection of the nation's youth.

The normal consumer expectation is that in the absence of an affirmative disclaimer a product intended for use in intimate contact with the human body is safe. So far as cigarettes are concerned, this expectation is undoubtedly even more widespread among children and teenagers than among adults. Adults who read newspapers, or who otherwise keep up with events, are likely to have some knowledge of the publicity concerning the hazards of cigarette smoking. Many children and teenagers do not read newspapers or keep up with current events. Many young people are therefore unaware of the publication of the report of the Surgeon General's Advisory Committee and other scientific findings in the area, or, if they have some awareness of these events, do not fully understand their significance. Thus the contention that the manufacturer's duty to disclose the dangers of smoking is canceled out by the publicity that has been accorded the smoking-and-health problem—a contention which in any event fails, for reasons to be discussed—is conspicuously without merit as applied to the millions of youthful consumers and potential consumers of cigarettes.

C. *Arguments against the Commission's proposed action.* Various arguments were made in the course of this proceeding against the Commission's adopting the proposed trade regulation rules. All of these arguments have been given the most careful consideration by the Commission. We shall attempt in this section of the report to deal with them fully.[115]

1. *The publicity that has been accorded the medical findings on the health hazards of smoking.* It is argued that wide publicity has been given the Report of the Surgeon General's Advisory Committee and other reports or findings on the health hazards of smoking by the news media or through the educational efforts of public and private groups; that consequently the consuming public is aware of the hazards of smoking; and that therefore the failure to disclose these hazards in cigarette advertising and labeling is not deceptive—no one is fooled because everyone knows that smoking is dangerous.

We know of no way of accurately measuring the intensity and effect of the publicity that has been given reports of the hazards of cigarette smoking; we can only surmise. Among the many millions of Americans who smoke cigarettes, or who are considering whether to begin smoking or resume smoking, there are undoubtedly some (probably a very small proportion) who have read and digested the findings of the Report of the Surgeon General's Advisory Committee and who realize, further, that these findings represent the consensus of medical thinking on the subject. There is probably a much larger proportion consisting of people who have read (or heard) about the report and have a general awareness of its findings. Almost certainly there are many—very possibly millions—more whose only awareness, at best, is that there is a "controversy" over the health consequences of cigarette smoking. But there is a difference between knowledge of the hazards of smoking and mere awareness that such hazards have been alleged or conjectured; and clearly the members of our last consumer group—and perhaps the members of the second group as well—do not know the fact, established by the Advisory Committee's Report and by other authoritative studies, that cigarette smoking is a cause of lung cancer and other serious diseases and contributes substantially to excess mortality. Since a substantial segment of the consuming public is in all probability not aware of this fact—a fact plainly material to their deciding whether or not to consume cigarettes—the seller's failure to disclose it is deceptive, notwithstanding the publicity that has been given the question of smoking and health.

In every false and misleading advertising case, it can be contended that the challenged advertisement is not in fact deceptive because the public has information, obtained from other sources than the advertiser, that cancels out any possibly misleading qualities of the advertisement itself. The contention is a reasonable one, where, for example, the false impression created by the challenged advertisement is preposterous and the Commission can infer that all but an insignificant and unrepresentative segment of the consuming public would, on the basis of common knowledge and experience, give no credit to it. That is not the present situation. There is nothing preposterous in a person's assuming, from the absence of any statement to the contrary in cigarette advertising and labeling, that the dangers of smoking have not been established. It is not unrealistic, on the basis of the Commission's experience with consumer reactions and attitudes, to suppose that this assumption is in fact widespread among consumers and potential consumers of cigarettes. The record of this proceeding supports such a finding (see, e.g., note 119, infra).

Furthermore, the argument that everyone is aware of the health hazards of smoking fails to take adequate account of the existence of different levels of awareness. To be remotely or dimly aware of a subject is not the equivalent of having the kind of knowledge upon which people normally act. Much of the publicity concerning the health implications of cigarette smoking is mere hearsay. Many people are aware that it has been said that smoking is harmful; but this is not the same as knowing that smoking is harmful. Relatively few have studied the sources of the publicity themselves—for example, the Advisory Committee's Report. As far as many, and perhaps most, people are concerned, the hazards of smoking are in the class of rumor—albeit disquieting rumor—rather than fact. This is an impression that has probably been reinforced by the cigarette industry's refusal to admit that smoking is in fact dangerous, and by the failure of government to take, as yet, affirmative steps to protect the public from the hazards of smoking. The Commission cannot rely on the public's vague, unspecific and (as we are about to see) merely transient awareness of advertising falsehoods as an excuse for not proceeding against them.

Such awareness is an especially inadequate substitute for actual knowledge in the case of a product, such as cigarettes, the consumption of which is a habit difficult to break. As the Surgeon General's Advisory Committee observed, "the smoking habit is linked with so many aspects of a person's psychological make-up that mere intellectual awareness of risks involved, even among those with rather intimate and intensive contact with the subject, is insufficient to overcome other dynamic factors involved." (ACR 375.) For a person habituated to smoking, it may provide a convenient means of evading the question of whether to discontinue smoking because of the health hazards involved to view the whole problem as an unsettled "controversy"—a health "scare" the objective significance of which has not been established but only discussed. In other words, the habituating nature of smoking is itself a barrier to full awareness and appreciation of the hazards of smoking, at least by the confirmed smoker. The barrier cannot be surmounted if the cigarette manufacturers, by their failure to disclose the dangers of smoking in their advertising and labeling, permit those dangers to remain in the category of pure rumor or hearsay. The publicity accorded the problem of smoking and health has not gone so far as to implant in the minds of the consuming public actual knowledge that smoking is a substantial health hazard.

There is no inconsistency in holding that such disclosure is necessary because of lack of sufficient public knowledge of the hazards of smoking and in recognizing, as the Commission has implicitly throughout this report, that there is considerable public concern with and anxiety about the hazards of smoking. In the first place, a deception, to be actionable, need not be universal. If many people are cognizant of the hazards of smoking, many others, and probably more, are not. In the second place, while there is little doubt that the publicity accorded the smoking and health problem has engendered widespread anxiety about smoking—anxiety which some cigarette advertising, at least, has attempted to allay [116]—there is an obvious difference between a generalized anxiety, suspicion or fear, on the one hand, and particularized knowledge of a fact, on the other.

[115] Those arguments involving the Commission's authority to conduct a trade regulation rule-making proceeding, rather than the merits of the proposed rules, are discussed in Part VI of this report, infra.

[116] As noted in Part III of this report, the marked shift in cigarette consumption from plain- to filter-tip cigarettes in the last ten years apparently reflects consumers' anxiety about the health consequences of smoking.

The existence of the former kind of awareness without the latter is likely to create public confusion, and therefore increases rather than eliminates the need for clear disclosure in cigarette advertising and labeling that smoking is a substantial health hazard.

An argument based on the present level of public awareness of the Advisory Committee's Report or other sources fails, in any event, to reckon with the dynamic factors that are involved here. It is perhaps true that today, but a few months after publication of the Advisory Committee's Report, public awareness of the hazards of smoking is at a higher level than previously. But the release of that Report was an extraordinary event. No similar event has occurred since or is likely to occur within the near future. The publicity given the Report has already diminished greatly and it may be surmised that the Report is rapidly receding in the public consciousness. There is no basis on which to project the amount of publicity that will be given the health hazards of cigarette smoking in the future.

The question of publicity seems, in its very nature, irreducibly fluid and dynamic. Consider, for example, the situation of a child nine years old at the time of the publication of the Advisory Committee's Report. Probably he had little or no awareness of this event, notwithstanding the publicity given it by the news media. In several years, say 1969, he will be faced with deciding whether or not to smoke. The level of publicity and public awareness relevant to his decision will not be that of January 1964 or that of today, but that of 1969. We cannot predict now what the level will be then.

Even if it be assumed—we think contrary to fact—that publicity concerning the health hazards of smoking has been so unusually widespread and intensive that it should have sufficed to bring home the dangers of smoking to everyone, consideration must be given to the countervailing effects of the industry's consistent refusal to acknowledge the existence of such health hazards, its past denials of their existence, and, most important, its long-continued and massive advertising, the tendency of which to neutralize public awareness of the health hazards of smoking has already been discussed. Not only has cigarette advertising failed to disclose the dangers of smoking; it has obscured them.[117] It is anomalous for the industry to point to publicity concerning these dangers, which originates outside the industry and which the industry, whether intentionally or not, has endeavored in its advertising to cloud and obscure, as an excuse for the industry's failing to fulfill its obligation to make the consuming publice aware of the dangers.[118]

Moreover, the simple fact that advertising for cigarettes has been and continues to be disseminated, particularly in the mass media, without any disclosure of the health hazards of smoking, breeds consumer misunderstanding of the extent to which smoking is an established, rather than merely a conjectured, danger. The members of the consuming public know that radio and television are regulated by the government, and that a network of state and federal laws exists to protect them from dangerous products and unfair or misleading advertising. When they witness the continued and unrestricted dissemination of cigarette advertising on radio and television and in other media their natural, instinctive reaction is that the danger of cigarette smoking cannot be an established fact—else government would take steps to restrict cigarette advertising, and specifically, would require that such advertising include a disclosure of the danger. The record of this proceeding clearly indicates that such reactions are widespread.[119]

The foregoing factors suggest that notwithstanding the publicity that studies and reports on the health hazards of cigarette smoking have received, the level of public awareness of those hazards has not reached the point at which to require disclosure of them in cigarette advertising and labeling would be superfluous. Lacking more reliable evidence of consumer understanding of those hazards, the Commission considers it necessary to resolve doubts on this score in favor of the public.

2. *The implications of the Commission's action in the present matter for other consumer products.* Another argument advanced against the Commission's proposal to require a cautionary statement in cigarette advertising and labeling relies on demonstrating a reductio ad absurdum. The argument is that if the Commission were to impose such a requirement on the cigarette industry, logic would require it to impose a similar

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[117] See R. 243 (testimony of President of American Cancer Society). The State Director of Health of West Virginia states:

"I am sure you realize that members of the medical and public health professions have long been familiar with much of the research cited in the Report of the Advisory Committee to the Surgeon General of the Public Health Service on Smoking and Health. As best we can, we have attempted to integrate this knowledge with ongoing programs as a means of combating the problem and especially to prevent adoption of the smoking habit by youth. For the most part, however, our efforts have had little effect. In my opinion this is due primarily to the tremendous forces allied against us, typified by the constant bombardment of the public through mass media with false and misleading advertising, tremendously influencing public attitudes toward smoking, and submerging, almost completely, the relatively small resources medicine and public health have been able to deploy in defense of their position." (Ex. 172, p. 1.)

[118] A recent article in Advertising Age, April 20, 1964, p. 40, col. 5, reports: "April sales of P. Lorillard Co. are running ahead of last year's, following a 'low point' in February—thanks in part to 'record levels of advertising,' Morton J. Cramer, president, told the company's annual meeting today.

"Because of the Surgeon General's report and 'competitive considerations,' Lorillard's advertising reached record levels during the first quarter, he said. 'The decision to spend these record amounts was made in the full knowledge that commitments of this magnitude would significantly affect our already depressed earnings, but it has already been proved sound—by the turnaround in sales,' said Mr. Cramer."

[119] See R. 36 (testimony of Senator Neuberger); R. 156 (testimony of Dr. Salber); R. 243–44 (testimony of Dr. Scott, President of the American Cancer Society); R. 312–13 (testimony of Dr. Bock); R. 333 (testimony of Dr. Graham); Ex. 67 ("The requirement of notice of health hazard is necessary also to prevent a common implicit deception: Americans expect their government to protect them from health hazards. Unless such a notice is required, a good number of Americans will think that cigarettes cannot be very hazardous if the Government permits their sale without notice"); Ex. 191 (letter from Professor Lilienfeld of the Johns Hopkins University School of Hygiene and Public Health); Ex. 440, p. 2 (letter from Chairman of the Department of Psychology, Beaver College, Pennsylvania); Ex. 334 (letter from American Cancer Society); Exs. 295(d), p. 1; 372. The Chairman of the Department of Sociology of the University of Wisconsin states:

"With regard to Rule 1, there is no question that this is a necessity if the image the cigarette advertising carries is to be altered. Currently, there is no implication that there are any dangers or potential hazards associated with cigarette smoking. Further, from my limited experience, it appears to be a most common assumption that the health hazards associated with cigarette smoking are trivial because no action is taken on the part of the Federal government. There seems to be an implicit assumption on the part of a substantial number of persons that if there was something really wrong with cigarette smoking, the government would do something about it. The government has intervened dramatically in the case of obviously dangerous drugs and of immediate food hazards, and thus there is some obvious reliance on the government for protection from such hazards. Since the dangers associated with smoking are less immediate, dramatic or coercive action certainly cannot be used. However, implicitly, until a caution such as is proposed under Rule 1 is instituted, a significant segment of the population will continue to believe that there is no hazard because no caution is required by the Federal government." (Ex. 196.)

Dr. Saxon Graham of the Roswell Park Memorial Institute states:

"It is well known to the public that radio and television programming is regulated by the federal government. The frequent repetition of advertisements utilizing large amounts of time indirectly gives sanction to the content of these advertisements in the viewers' eyes. In my own discussions with smokers, I have frequently heard the statement that, 'Smoking cannot be too bad for you, or the government would not let them advertise on the television.' In effect, the government is sanctioning smoking by allowing advertisers to use public television and radio time and the mails to advertise. Past research, which we and others have done, shows that the sanctions of authority-figures are very important in smoking. Thus, in families where parents and older siblings smoke, the probability that children will smoke is much increased. The effect of physicians' smoking on their patients' smoking habits has been observed by many of the interviewers in our studies." (Ex. 211, pp. 4–5).

In the words of the Royal College of Physicians of London, "Many smokers regard the lack of any official action against cigarette smoking as an indication that the evidence is at present 'only theoretical' or 'mere statistics.' If the Government do not consider it necessary to take action, it is argued, no action is as yet required of the individual." Smoking and Health 52 (1962) (Ex. B, App. II, Ex. 28, p. 52).

requirement with respect to the advertising and labeling of such products as automobiles, butter, candy, and alcoholic beverages. Such products are, however, clearly distinguishable from cigarettes for purposes of requiring affirmative disclosure of health hazards. A few examples should make this clear.

There is some evidence that certain foods may increase the level of cholesterol in the blood and thereby seriously endanger the health of the eater. However, such evidence has not, to our knowledge, reached the point at which remedial action by this Commission would probably be warranted. We are aware of no counterpart to the Surgeon General's Advisory Committee on Smoking and Health which has found butter, eggs or any of the other common "rich" foods to be so hazardous as to warrant, in the Advisory Committee's words, "remedial action" (ACR 33). Should it some day become established that consumption of any of these foods is as dangerous as cigarette smoking, remedial action by the Trade Commission, the Department of Agriculture, or some other agency might be appropriate. We note, however, a number of significant distinguishing factors, in addition to the basic difference regarding the nature and weight of the evidence linking the product to disease and death, as between cigarettes and rich foods: Cigarette smoking is habit-forming; it is peculiarly attractive to children and teenagers; and cigarette advertising has been massive and continuous—unlike, for example, egg advertising.

The relevance, from the standpoint of the need for advertising regulation, of the fact that cigarette smoking is habit-forming has been emphasized by Dr. Joseph Berkson in a letter to the Commission:

> As respects the general question of cigarette advertising, it happens that I personally think there is a social case for some sort of control, quite apart from consideration of the specific health aspects of smoking under recent discussion, arising from the fact that cigarette smoking is "habit forming." It is common knowledge that a person who has smoked for a long time generally finds it difficult and in some cases virtually impossible, to give up smoking. This is not a "psychologic" effect but a pharmacologic effect. As a matter of personal social philosophy I think the advertising of a consumer product which, once purchased, habituates the consumer to continue its purchase is in a quite different category, with respect to intensive advertising, from that of say automobiles, however possibly deadly the use of the latter may be. [Ex. 318(n), p. 2.]

It is also true that overindulgence in rich foods such as candy or butter may lead to obesity, a condition which is dangerous to health. But this, unlike smoking, is a problem of excess. The dangers of cigarette smoking are by no means confined to the excessive smoker; "normal" smoking is extremely dangerous as well. There is no known moderate or safe level of cigarette consumption.[120] Certainly the one-pack-a-day smoker—and even a person who smokes fewer than ten cigarettes a day—incurs a grave risk to his life and health, as the mortality tables in the Advisory Committee's Report make clear.[121] Significant in this regard is the Advisory Committee's finding that, "In comparison with nonsmokers, average male smokers of cigarettes have approximately a 9- to 10-fold risk of developing lung cancer" (ACR 31; emphasis added).

Moreover, there do not appear to be any accepted criteria for distinguishing "moderate" from "excessive" smoking. It would be more accurate to speak of degrees of excess. While we may assume that the normal person eats in moderation and does not become obese, we may not assume that the "normal" smoker is not seriously endangered by his habit. On the contrary, it appears that only the abnormal, atypical smoker—one, perhaps, who smokes only one or two cigarettes a day, or never inhales, or discontinues smoking after a few years—may escape seriously endangering himself.

The comparison of cigarettes and alcoholic beverages is also inexact. Alcoholism, along with its derivative physical ailments, is a very serious social problem, but it is a problem, again, of excess.[122] Alcohol in moderation is not generally considered deleterious to the health of the user. Indeed, it is frequently prescribed by doctors for the treatment of various ailments (see, e.g., R. 248).

Another significant point of contrast between alcoholic beverages and cigarettes has been made in the Report on Smoking and Health of the Royal College of Physicians of London: "While many if not the majority of people enjoy alcoholic drinks on relatively infrequent occasions, however, there are very few occasional smokers. Most smokers consume a regular daily amount of tobacco. It appears that smoking is generally much more habit-forming than drinking." (p. 42.)

But a more basic distinction between alcoholic beverages and cigarettes as far as compelled disclosure of health dangers in advertising and labeling is concerned is that the advertising, labeling, and sale of alcoholic beverages are subject to an elaborate network of public and private regulation that has no parallel in the cigarette industry. It is common knowledge that advertisements for hard liquor are not broadcast on radio or television, that liquor advertising has consistently eschewed the themes of romance, contentment and sociability that figure so prominently in cigarette advertising, and that alcoholic beverages are labeled to disclose the alcoholic content. Advertising for alcoholic beverages is subject to comprehensive and detailed regulation by the United States Treasury Department and conforms to stringent industry-wide codes which long predate any efforts by the cigarette in-

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[120] The doctors and scientists who appeared before the Commission in this proceeding were unanimous on this point. See, e.g., R. 14–15 (testimony of Dr. Hundley, Vice-Chairman of the Surgeon General's Advisory Committee), R. 245 (testimony of Dr. Scott, President of the American Cancer Society), R. 319 (testimony of Dr. Bock), R. 332 (testimony of Dr. Graham), R. 521–22 (testimony of Dr. Wynder); Ex. 529(n), p. 10 (submittal by Drs. Wynder and Hoffman of the Sloan-Kettering Institute). Dr. Scott explained:

> Commissioner ELMAN: Is there a safe consumption level as far as cigarette smoking is concerned?
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> Dr. SCOTT: There must be, but I don't know what the level is. We know the less you smoke the lower your risk to lung cancer.
>
> Commissioner ELMAN: Suppose a man smokes half a pack a day and figures all this about cancer applies only to a heavy smoker. What would you say to such a patient?
>
> Dr. SCOTT: Well, I would say, "You are on the borderline, and if you have a reasonably high resistance to the effects of the nicotine and tar contents of the cigarette smoke, you probably will escape the serious effects of it. On the other hand, if you happen to have a low susceptibility to it—in other words, that your body is more responsive to the effects of the tars and nicotine content, then you are going to head for trouble." You see, there is a natural variation in the person's susceptibility to even aspirin, and to any drug, for that matter, to any product, including nicotine and cigarette tars.
>
> So this has to be taken into consideration, too. And this explains why everyone doesn't get it, even though they may smoke a pack a day.
>
> Chairman DIXON: What would you tell your patients about smoking cigarettes, Doctor?
>
> Dr. SCOTT: I tell my patients that if they are smoking half a pack or a pack a day, they had better stop. If they are smoking a pack, they are surely headed for trouble.
>
> Chairman DIXON: Very few people who smoke cigarettes smoke less than a pack.
>
> Dr. SCOTT: Well, I don't know what the figures are. I would accept your statement as true, sir. [R. 244–46.]

[121] The Surgeon General's Advisory Committee found: "For groups of men smoking less than 10, 10–19, 20–39, and 40 cigarettes and over per day, respectively, the death rates are about 40 percent, 70 percent, 90 percent, and 120 percent higher than for non-smokers." (ACR 35–36). These figures make clear that even the light smoker runs a substantial risk of premature death in smoking, and the average pack-a-day smoker a very substantial risk indeed. Thus, "There is no threshold of consumption below which a smoker may hold his consumption and eliminate excess risk of death; all studies investigating a possible dose-response relationship indicate that even a small amount of cigarette smoking carries a substantially increased risk of death from lung cancer and other diseases. Thus, although the moderation concept may apply to advertising of liquor or other products, it is not cogent in regard to cigarettes. Moderation in smoking is associated with a significantly higher risk of death than that associated with no smoking." Letter from Dr. Saxon Graham of the Roswell Park Memorial Institute, Ex. 211, p. 4.

[122] The problem of drunken driving, which is also a serious problem of public safety, is not necessarily a problem of alcoholism. It is, however, dealt with by more stringent remedies than any requirement of disclosing the hazards of drunken driving in automobile advertising could provide—viz., criminal penalties.

dustry at systematic self-regulation.[122] The places in which alcoholic beverages may be purchased, and even the prices of alcoholic beverages, are commonly fixed by state law. The Federal Constitution, of course, expressly permits local prohibition of the sale of alcoholic beverages. And the sale of alcoholic beverages to minors is carefully regulated.

The short of it is that alcoholic beverages have been recognized by law, by government, and by industry as a dangerous product, and their sale, advertising, labeling, and even use[124] are regulated to a degree wholly unknown in the cigarette industry. The necessity for additional regulation in the form of compelled disclosure of dangers in all advertising and labeling presents, therefore, a quite different question from the case of cigarettes.

The automobile is undoubtedly a dangerous instrumentality. Here again, however, society has already taken specific and substantial steps to protect the public from physical injury. No person may drive without a license. Numerous laws, many providing for heavy penalties, regulate the use of the automobile. Many states have comprehensive inspection requirements to ensure the safety of automobiles. Driving by minors is strictly regulated. In light of the extensive and explicit public concern, manifested in a great network of legal regulations, for safe driving, it is most improbable that a significant number of automobile purchasers are unaware that the automobile is a dangerous instrumentality. Society has taken most elaborate pains to bring this truth home to every driver. There is no parallel in the case of cigarettes. For example, no license is required to smoke a cigarette, and smoking by minors is a matter largely of parental, not public, regulation. The absence of a comprehensive scheme for the regulation of the cigarette industry at all comparable to that which governs automobiles and driving makes it imperative that the Commission so enforce Section 5 as to ensure at least minimal public knowledge of the hazards of smoking.

To deny that cigarettes are, for present purposes, comparable to butter, candy, liquor or automobiles is to affirm that the principle requiring disclosure of a product's hazards in labeling and advertising should not be applied mechanically or uncritically, or pushed to an absurd extreme. It can be applied only on the basis of the specific and concrete facts and circumstances pertaining to the particular product involved. Dangers that are obvious or generally known are not required by Section 5 of the Trade Commission Act to be disclosed by the seller. No one would suggest, for example, that every carving knife should carry a warning that the edge is sharp. Section 5 is concerned with unfair or deceptive acts or practices, and if the dangers of using a product are known, the seller's nondisclosure of them is unlikely to be either unfair or deceptive. It is a question of judgment, which cannot be answered by any simple or mechanical formula, whether in the particular circumstances the nondisclosure of a product's hazards carries a sufficient probability of substantial public injury to justify remedial action. It is also a question of judgment whether the appropriate remedy is a requirement of disclosure in labeling alone, or whether the requirement should extend to advertising.

The foregoing should dispel fears that the Commission's action in this proceeding has sweeping implications for the advertising and labeling of consumer products other than cigarettes. The Commission's conclusion that disclosure of the danger of use of the product is required by Section 5 of the Trade Commission Act in all advertising and labeling of cigarettes is based on a combination of special factors not necessarily present in the case of any other product. This trade regulation rule should not be regarded as a precedent compelling similar regulation of the butter, candy, liquor, automobile, or other industries.

3. *Whether the Commission should cede the problem of regulating cigarette advertising and labeling to Congress.* It has been suggested that in view of the magnitude and public importance of the problem of cigarette advertising and labeling in light of the health hazards of cigarette smoking, the Commission should relinquish its jurisdiction of the problem and leave to Congress the task of devising an appropriate solution to it. Congress, however, delegated the task of preventing unfair or deceptive acts or practices in commerce to the Commission, and the advertising and labeling of cigarettes are clearly subject to the Commission's jurisdiction as created by Congress. We are now asked in effect to redelegate to Congress our responsibilities for preventing unfair or deceptive acts or practices in the cigarette industry. We are without power to do so, in the absence of action by Congress curtailing the Commission's jurisdiction.

Specifically, it is contended that the problem of cigarette advertising and labeling in relation to the health hazards of smoking should be left by the Commission to Congress, first, because the Commission is not competent to appraise the medical and scientific issues involved, and second, because the impact of Commission action on the prosperity of the cigarette industry, and on the national economy, is likely to be drastic. As to the first point, however, for reasons already stated we believe that the Commission is entitled, and indeed compelled, to accept the findings and conclusions contained in the Report of the Surgeon General's Advisory Committee. Those findings and conclusions, which we deem authoritative, provide a comprehensive, reliable and fully adequate medical and scientific predicate for the rule and this report. It is premature to consider how in the future the Commission should deal with aspects of the smoking and health problem not before it in this proceeding.

So far as the impact of this trade regulation rule on the cigarette industry, and derivatively on the total national economy, is concerned, the catastrophic consequences of Commission action predicted by some of the witnesses at the public hearings in this matter are entirely too speculative to warrant the Commission's failing to perform its clear statutory duties. It is suggested that, should disclosure of the hazards of cigarette smoking be required in all advertising and labeling, the consumption of cigarettes would immediately decline so severely as to cause great hardship to the industry, and consequent dislocation to the economy as a whole due to the importance of the industry to the national economy. If, however, as this suggestion presupposes, the industry's failure to disclose in its advertising and labeling the hazards of smoking is principally responsible for the present high level of cigarette consumption—if substantially fewer cigarettes would be consumed if the dangers of smoking were disclosed to the public in cigarette advertising and labeling—that would seem to make more rather than less imperative the necessity of immediate action by the Commission to compel such disclosure.

Be that as it may, the precise effect that the Commission's action would have on the cigarette industry, let alone on the national economy as a whole, cannot be even roughly estimated at this time. Even assuming that the Commission is authorized to permit the continuation of unlawful marketing practices, in a form endangering human life and safety, on grounds of economic hardship, it plainly may not do so where, as here, the prob-

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[122] Federal Alcoholic Administration Act of 1935, 40 Stat. 984, as amended, 27 U.S.C. section 205(f). See O'Neill, Federal Activity in Alcoholic Beverages Control, 7 Law & Contemp. Prob. 570 (1940).

"The federal agency charged with the regulatory powers over advertising of intoxicating beverages is the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The source of this unit's authority over the interstate liquor trade is derived from the Federal Alcoholic Administration Act of 1935, which empowers the Division to promulgate regulations and standards necessary to insure truthful advertising. The authority so vested seems more extensive than that delegated to the other administrative agencies considered. Not only does the Division have the authority to act against deceptive and misleading representations but it may, under its power to implement the statute by formulating its own standards, require the affirmative disclosure of pertinent information in advertisements. This is the basis for regulations necessitating the inclusion in all liquor advertisements of the name and address of the advertisers, the class and type of the product, and the alcoholic content of the beverage. This function may be described as insuring not only truthful advertising but also informative advertising. To implement these provisions an elaborate and detailed classification as to vintage, alcohol content, type, etc. is provided as a guide by which the sufficiency and accuracy of the representations can be judged. Label identification and misbranding are likewise closely supervised by the Division, and all labels must be submitted for approval before use. The effect of this extensive rule-making power has been to transform the liquor business into the most thoroughly regulated and carefully supervised of all industries." Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1049–50 (1956). See also id., at 1066 (state regulation of liquor advertising).

[124] For example, laws forbidding drunken driving regulate the use, rather than the sale as such, of liquor.

ability of such hardship is completely uncertain. We note that the witnesses who argued economic hardship at the public hearings did so in the form of naked assertion. No supporting data were adduced that would afford the Commission more than a purely conjectural basis for assessing the economic hardship, if any, that compliance with the trade regulation rule promulgated herewith would entail.

4. *Whether cigarette advertising and labeling should be left to industry self-regulation.* At the public hearings in this matter, the spokesman for the Tobacco Institute recommended that the entire problem of eliminating unfair or deceptive acts or practices from cigarette advertising and labeling be left for solution by cooperative action among the members of the cigarette industry. It was stated at that time that the industry was working on advertising guidelines, but no details were given.

However, no industry representative has indicated that cigarette manufacturers are willing to disclose the health hazards of cigarette smoking in advertising and labeling, as proposed in rule 1 in the Commission's notice of this rule-making proceeding. The trade regulation rule now being promulgated by the Commission thus covers an area which the industry has not yet given any indication it intends to enter. Proposed rules 2 and 3 relate to affirmative deceptive and unfair representations in advertising and labeling. In this report, the Commission has dealt at length with such practices. We have declared the standards of conduct to which the members of the cigarette industry must conform in order to avoid violation of the Trade Commission Act. The industry has indicated an intention of acting voluntarily to end undesirable practices in the area covered by proposed rules 2 and 3, and should the industry succeed in eliminating such practices, there will be no need for formal Commission action. The Commission has therefore determined not to adopt proposed rules 2 and 3, or any similar provision, at this time as formal trade regulation rules, even though the record of this proceeding, and this report, fully justify doing so. The Commission will maintain a close surveillance of the industry's efforts to eradicate, through voluntary efforts, all traces of unfairness and deception in affirmative representations or suggestions in all cigarette advertising and labeling.

5. *Whether the Commission should postpone all action pending completion of "Phase II".* The study of smoking and health conducted under the direction of the Surgeon General of the United States Public Health Service was planned to include two phases. Phase I was the technical phase; it was completed with the publication of the Advisory Committee's Report. "Recommendations for actions were not to be a part of the Phase I committee's responsibility. No decisions on how Phase II would be conducted were to be made until the Phase I report was available. It was recognized that different competencies would be needed in the second phase and that many possible recommendations for action would extend beyond the health field and into the purview and competence of other Federal agencies." (ACR 8.) To date, no final decisions as to the conduct of Phase II have, so far as the Commission is aware, been made.

At the public hearings in this matter, it was argued that the Commission ought to withhold any remedial action pending the completion of Phase II. (See, e.g., R. 395.) This argument misconceives the scope and purpose of Phase II. In planning on separate phases, technical and remedial, the Public Health Service and the other interested bodies were aware that, depending on the technical conclusions in the first phase regarding the hazards of smoking, special remedial action might be appropriate—for example, a campaign of public information and education, or greatly increased research—involving various public and private bodies. (See Ex. 516(b), letter from Assistant to the Surgeon General for Information.) Phase II was to be concerned with such action. There was, however, no intention expressed that Phase II should entail a moratorium on the enforcement of laws governing unfair or deceptive acts or practices in the cigarette industry, or on any other law-enforcement activities, whether undertaken by the Federal Trade Commission or by any other governmental agency.

This trade regulation rule proceeding, and the rule promulgated herewith, do not constitute special or extraordinary remedial action within the scope or contemplation of Phase II of the Surgeon General's study. As the Governor of Kentucky stated in this proceeding, "government agencies set up to protect the public should provide the strongest protection possible from those who would abuse or prey upon the public." [125] It was not the intention of those who devised the Surgeon General's study to attenuate this duty. Phase II does not excuse the Commission from enforcing the Federal Trade Commission Act in the cigarette industry; it does not warrant an indefinite moratorium on the Commission's fulfilling its presently existing statutory responsibilities. Accordingly, the Surgeon General of the Public Health Service, far from accusing the Federal Trade Commission of having jumped the gun on Phase II, has announced the support of the Public Health Service for this trade regulation rule proceeding.[126]

[125] R. 435. Similar views were expressed by Congressmen from tobacco states. E.g., "our government, through this Commission, and through other appropriate agencies, has a responsibility to let the American people know that certain things may be hazardous" (R. 440, Congressman Fountain); "I believe that deceptive advertising by tobacco companies and all other American companies and businesses should be prohibited." (R. 445, Congressman Taylor.) It was not suggested that the Commission's statutory duties of law enforcement have been suspended by the provisions for Phase II.

[126] "The Federal Trade Commission promptly and courageously announced the action it intends to take within a week following release of the Advisory Committee's Report, actions designed to prevent the people of this country from being deceived or misled by cigarette advertising. We intend to support the Federal Trade Commission in their proposed actions—because we are convinced that the American people have been deceived and misled by cigarette advertising—and their health has been harmed as a consequence." Address of Surgeon General Luther L. Terry to the National Press Club, February 25, 1964 (R. 148).

VI. The Federal Trade Commission's Rule-Making Authority

This proceeding for the promulgation of trade regulation rules for the advertising and labeling of cigarettes is authorized by the provisions of Subpart F of the Commission's Procedures and Rules of Practice (effective Aug. 1, 1963),[127] and has been conducted in accordance with the procedures specified in that subpart.[128] In his opening remarks at the

[127] Section 1.63 of the Procedures and Rules of Practice provides:

Trade Regulation Rules—(a) *Nature and authority.* For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices. Such rules and regulations (hereinafter called "trade regulation rules") express the experience and judgment of the Commission based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.

(b) *Scope.* Trade regulation rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular product or geographic markets, as may be appropriate.

(c) *Use of rules in adjudicative proceedings.* Where a trade regulation rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to the particular case.

Under this procedure, the Commission has already issued trade regulation rules for the sleeping-bag, dry-cell battery, and binocular industries.

[128] Commission rule-making procedures are set forth in §§ 1.66–1.67 of the Procedures and Rules of Practice, which provide:

§ 1.66 Initiation of Proceedings—Petitions. Rulemaking proceedings may be commenced by the Commission upon its own initiative or pursuant to petition therefor filed with the Secretary by any interested person or group. Procedures for the amendment or repeal of a rule are the same as for the issuance thereof.

§ 1.67 Procedure—(a) *Investigations and conferences.* In connection with any rule-making proceeding, the Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of Subpart D of Part 1 of these rules.

(b) *Notice.* General notice of proposed rulemaking will be published in the Federal Register and, to the extent practicable, otherwise made available to interested persons. Such notice will include (1) a statement of the time, place and nature of the public proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

public hearings on the proposed rules, the Chairman of the Commission described the trade regulation rule procedure in the following words:

A Trade Regulation Rule-making proceeding is not adjudicative in character. It is not a proceeding to determine whether or not particular persons or companies have violated the laws administered by the Commission. It is prospective, not retrospective, in its application. Its purpose is to determine for the future whether certain business practices, if followed by the members of an industry, would be unlawful. Trade Regulation Rules are not legislative in the sense of adding new substantive rights or obligations. Trade Regulation Rules do not broaden or expand the prohibitions contained in the statutes administered by the Commission, but, rather, define their application to specific practices or a specific industry within the jurisdiction of the Commission. Before such a Rule is promulgated by the Commission, all interested persons are given full opportunity to present data, views and arguments relevant to whether the rule should be adopted.

If after the Commission has promulgated a rule any person or company continues to engage in conduct forbidden by the Rule, and the Commission issues a complaint alleging that such conduct is in violation of a statute enforced by the Commission, the Commission may, in such an adjudicative proceeding, rely on the Rule to the extent that it is fair and proper to do so. In a subsequent adjudicative proceeding where a Trade Regulation Rule is relied upon, the respondent may challenge the legality and propriety of relying upon the rule in the particular case. [R. 5–6.]

At the public hearings, the question was raised whether the Commission is authorized by the Trade Commission Act to conduct a trade regulation rule proceeding (see, e.g., R. 45–46, 53–54, 57, 180–90). This part of the report considers that and related questions concerning the Commission's rule-making authority.

A. *The lawfulness of the trade regulation procedure.* 1. *The Nature of Trade Regulation Rules.* Section 2(c) of the Administrative Procedure Act provides: " 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. * * *" In a leading case, the Supreme Court has stated: "Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual." Columbia Broadcasting System v. United States, 316 U.S. 407, 418 (1942).

Section 5(a)(1) of the Federal Trade Commission Act declares unlawful all unfair methods of competition, and unfair or deceptive acts or practices, in interstate commerce. The basic and comprehensive grant of power to the Commission to enforce section 5(a)(1) is contained in section 5(a)(6), which empowers and directs the Commission to prevent the use of such unfair and deceptive methods, acts, and practices. The promulgation of a trade regulation rule is an exercise of the power and duty created by section 5(a)(6). The issuance of a cease-and-desist order under section 5(b) is merely one form of exercising the general power conferred by section 5(a)(6). A trade regulation rule, to use the language of the Supreme Court, "is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual." The Supreme Court has held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947).

The Commission's Procedures and Rules of Practice make clear,[129] as does the Commission's formal notice commencing the present proceeding, that "Trade Regulation Rules do not enlarge * * * [the] substantive legal prohibitions [of the statutes which the Commission administers], but define and particularize them as applied to specific problems and conditions."[130] Nevertheless, a position frequently taken at the public hearings in this matter by opponents of the Commission's proposed rules was that the proceeding is ultra vires because the Commission has not been authorized by Congress to promulgate rules having the force and effect of law.[131] This position rests, however, on a manifestly false premise.

Congress delegated to the Commission the task of preventing unfair trade practices. It did this, as noted in Part IV of this report, because it felt that conventional judicial processes were not well suited to such a task and that it might better be performed within the framework of the administrative process. Undoubtedly, Congress intended the Commission to have a range of powers and procedures adequate to the fair and effective discharge of its delegated responsibilities. On the other hand, Congress has determined, notably in the Administrative Procedure Act, that agency action which infringes traditional procedural rights, such as the right to a fair hearing, should not be permitted. The interest in flexible and effective administrative action, and the interest in protecting the rights of persons subject to the agency's jurisdiction, must both be effectuated. The question is whether the Commission's trade regulation rule procedure, as applied to the problems of cigarette advertising and public health (insofar as such problems are within the statutory jurisdiction and responsibilities of the Commission), is a lawful exercise of its duty to prevent unfair or deceptive trade practices, or whether it infringes the rights conferred by the Administrative Procedure Act or elsewhere or is otherwise outside of the Commission's authority. The question is not answered by mechanical reliance on a division of all rules into "interpretive" and "legislative."

2. *Rule-making versus adjudication in the administrative process.* Every tribunal that decides cases—even a Federal court established under Article III of the Constitution—is perforce engaged in substantive rule-making. The common law is a body of judge-made substantive rules, principles, and prescribed standards of conduct. For example, the federal courts have developed a host of so-called per se rules under the Sherman Act. These principles are glosses upon, not provisions to be found in, the language of the Sherman Act. Such rules represent the efforts of the courts to define and particularize the requirements of the Act. Needless to say, there is no statute which permits judges to make rules in this fashion. None is necessary. The laying down of substantive principles in the

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(c) *Participation by interested persons—(1) Submission of written data, views or arguments.* In all rulemaking proceedings the Commission will afford interested persons an opportunity to participate in the proceeding through the submission of written data, views or arguments.

(2) *Oral hearings.* Oral hearing on a proposed rule may be held within the discretion of the Commission. Any such hearing will be conducted by the Commission, a member thereof, or a member of the Commission's staff. At the hearing interested persons may appear and express their views as to the proposed rule and may suggest such amendments, revisions and additions thereto as they may consider desirable and appropriate. The presiding officer may impose reasonable limitations upon the length of time allotted to any person; if by reason of the limitations imposed the person cannot complete the presentation of his suggestions, he may within twenty-four (24) hours, file a written statement covering those relevant matters which he did not orally present. A transcript of the hearing shall be made and shall constitute a part of the record of the proceedings.

(d) *Promulgation of rules.* The Commission, after consideration of all relevant matters of fact, law, policy and discretion, including all relevant matters presented by interested persons in the proceeding, may adopt and publish in the FEDERAL REGISTER an appropriate rule, together with a concise general statement of its basis and purpose and any necessary findings.

(e) *Effective date of rules.* The effective date of any rule, or of the amendment, suspension or repeal of any rule will be specified in the notice published in the FEDERAL REGISTER, which date will be not less than thirty (30) days after the date of such publication except as otherwise provided by the Commission upon good cause found and published with the rule.

[129] Compare Section 1.63, supra note 127, with Section 1.65, which provides: "Rules having the force and effect of law are authorized under Section 6 of the Wool Products Labeling Act of 1939, Section 8 of the Fur Products Labeling Act, Section 5 of the Flammable Fabrics Act, and Section 7 of the Textile Fiber Products Identification Act." Section 1.64 provides: "Quantity limit rules are authorized by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. These rules have the force and effect of law."

[130] App. C, infra. See also the Chairman's opening remarks at the public hearings in this matter, quoted supra.

[131] See, e.g., R. 53–54, 83–F, 83–I, 188–89. Witnesses frequently referred to rules having the force and effect of law as "substantive." See, e.g., R. 57–58, 64. However, any rule, even a purely advisory one, is "substantive" if it deals with the substantive requirements of the laws administered by the agency (in contrast to the agency's rules of practice or other procedural regulations).

course of adjudication is inherent in the adjudicative process. Cf. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

If the courts may and do make rules in the course of adjudicating, a fortiori the Commission may—and indeed is under a positive obligation to—engage in substantive rule-making in its adjudications. As noted in Part IV of this report, the Commission, in the enforcement of section 5 of the Trade Commission Act, has duties which transcend the narrowly adjudicative. Congress could have enumerated, and specifically proscribed, all of the trade practices it considered "unfair." Had it done so, the Commission's task would have been simply to apply the law as given to the facts as found in particular cases. For reasons of practicality, however, the task of elaborating substantive principles and defining standards of forbidden conduct— of filling in the bare policy outline drawn by Congress when it determined that unfair methods of competition in commerce should be outlawed—also was delegated to the Commission. The Commission has been made responsible not only for the prevention of unfair or deceptive practices, but also, and as a necessary threshold step, for the definition of such prohibited practices. It was the intention of its founders that the Commission would act creatively and imaginatively, within the broad contours of section 5, to create an up-to-date body of trade regulation law. Even if the Commission had never undertaken a single rule-making proceeding, but had confined itself exclusively to the adjudicative framework provided in section 5(b) of the Trade Commission Act, it could not have avoided continual involvement in substantive "rule-making" and still have remained faithful to its mandate. Nor has it avoided such involvement. The law of deceptive practices did not exist in 1914; it was created by the Commission. It is a body of substantive principles and defined standards of conduct, virtually all of which were established by the Commission in adjudicative proceedings.

To say that an administrative agency like the Commission has a responsibility for substantive rule-making, as well as for adjudication in its narrow sense, is another way of saying that the agency has a positive role to play in the definition of legal standards. A common criticism of the federal administrative agencies has been that they devote their attention unduly to the strictly adjudicative part of their task—settling disputes and assessing liability for past acts—and slight the critical function of formulating substantive policy and legal standards.[132] The Commission, no less than agencies having regulatory duties with respect to specific industries, has such a function. It is to determine what trade practices should be forbidden as unfair or deceptive. Congress confided the making of these determinations to the Commission; and whether made in formal rule-making proceedings or in adjudicative proceedings, they constitute the substantive principles and standards of trade regulation law.

The question, then, is not whether the Commission may declare substantive standards and principles, for it plainly may and must. The question is whether the Commission may, in appropriate matters—specifically, the matter of cigarette advertising and labeling in relation to the health hazards of cigarette smoking—utilize the procedures of the formal rule-making proceeding to promulgate substantive standards or principles, or whether it may promulgate them only in the course of adjudication. The latter course is always open to the Commission. However, there may be serious disadvantages, both to the agency and to the persons subject to its jurisdiction, where substantive rule-making is conducted exclusively as a by-product of adjudication. We shall consider some of these disadvantages briefly in this section.[133]

(1) The Administrative Procedure Act, in its provisions governing formal rule-making proceedings, requires that all interested persons be given an opportunity to express their views on a proposed rule before it is finally adopted (sec. 4(b)). The reason for such a requirement is obvious. Those who will be subject to a rule should have an opportunity to criticize it or suggest modifications. And, quite apart from considerations of fairness, their participation in the rule-making process is likely to assist the agency in formulating a practical and sound rule. Where rules are made, not in formal rule-making proceedings, but in adjudicative proceedings, the requirement is ordinarily not met. Views of all interested persons are not solicited or received—only the views of the particular litigants. Though a decision may have far-reaching significance by reason of the rule it lays down, and affect many persons besides the particular litigants, only the latter will have participated in the rule-making process; and, in many cases, even they will have had no opportunity to express their views on the rule declared by the court or tribunal. See, e.g., Erie R. Co. v. Tompkins, supra.

(2) The kind of record made in an adjudicative proceeding is usually not tailored to the needs of rule-making. The rules of evidence, and other procedural safeguards governing trial-type hearings, have been developed with an eye toward the determination of so-called "adjudicative" facts—who did what, where, when, why, etc. Experience has shown that issues of this sort can be most satisfactorily dealt with only if the traditional procedural rights, e.g., cross-examination, are faithfully observed. But the procedures designed for determining individual liability are not necessarily well-adapted to the ascertainment of such "non-adjudicative" matters of fact, policy and discretion upon which rules of general application are based.[134] Hence, in formulating a substantive standard or rule, courts and tribunals frequently must rely on considerations outside the record of the particular case in which the general principle is formulated.[135] They may go to the records of prior cases, or they may rely upon sources, such as articles in scholarly journals (or their own general knowledge and experience), that are contained in no record. These are useful and proper approaches, but they have their limitations. The records of earlier cases may give a broader picture of the considerations relevant to formulating a rule of general application than the record of the particular case to be decided, but it may not be broad enough, especially if a novel problem area is involved. If the court or tribunal engages in private research or draws upon its private experience, the parties, and other persons who will be subject to the rule, may have neither notice of, nor opportunity to refute, the authorities or other sources relied upon.

To predicate rules developed in the course of adjudication on matters outside the actual record of the case is a traditional and necessary incident of the judicial and administrative processes. It is done constantly. It has been expressly sanctioned by the Supreme Court in the context of administrative adjudication, the Court emphasizing that the agencies are intended, and not merely permitted, to decide cases on the basis of their broad knowledge and experience as well as the actual record.[136] But clearly it may not

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[132] See, e.g., Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards (1962); Redford, National Regulatory Commissions: Need for a New Look (1959); Landis, Report on the Regulatory Agencies to the President-Elect 22–24 (1960); Task Force Report on Regulatory Commissions 40–42 (1949); Hector, Problems of the CAB and the Independent Regulatory Commissions, 69 Yale L. J. 931 (1960).

[133] Many of the points discussed in this section are more fully developed in Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 60 Yale L.J. 729 (1961), and Baker, Policy by Rule or Ad Hoc Approach—Which Should It Be?, 22 Law & Contemp. Prob. 658 (1957).

[134] "The test of the judicial process, traditionally, is not the fair disposition of the controversy; it is the fair disposition of the controversy upon the record as made by the parties. * * * [For the administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates, not the fairness as between the parties of the disposition of a controversy on the record of their own making." Landis, The Administrative Process 38–39 (1938).

[135] A classic instance of this process is Durham v. United States, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954), where a new rule governing the defense of insanity in criminal proceedings was formulated on the basis of extensive extra-record materials.

[136] See Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); Radio Officers' Union v. N.L.R.B., 347 U.S. 17, 48–49 (1954); N.L.R.B. v. E. & B. Brewing Co., 276 F. 2d 594, 598 (6th Cir. 1960). Cf. N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953). That agency expertise, as well as record evidence, can support a finding of unlawfulness has been held with specific reference to the Trade Commission. "The Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements. * * * The Commission, which is deemed to have expert experience in dealing with these matters * * * is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." E. F. Drew & Co. v. F.T.C., 235 F. 2d 735, 741 (2d Cir. 1956).

be a completely ideal method of rule-making in all situations.

(3) A related point is that adherence to the adjudicative method of rule-making precludes the agency from utilizing those methods of gathering and assessing facts that are peculiarly appropriate to the needs and conditions of rule-making. The Congressional committee hearing is an example of how a body having legislative responsibilities proceeds in the formulation of policy. The records of such hearings contain matters of fact, arguments of law, and considerations of policy and discretion—the views, data, and arguments of all interested persons. Congress does not rely upon trial-type proceedings in order to formulate the content of legislation. For an agency to limit itself to such proceedings in formulating the content of rules having general application seems, therefore, a practice of doubtful merit. It involves the danger of cutting the agency off from systematic access to the broad range of considerations that must be taken into account in the rule-making, in contrast to the narrowly adjudicative, process.

(4) In an adjudicative proceeding, the agency is precluded by the separation-of-functions provisions of the Administrative Procedure Act (§ 5(c)) from consulting those members of its staff who have played a prosecuting or investigative role in that, or a factually related, case. The agency is thereby prevented from fully utilizing its expertise, for an agency's expertise resides in large part in its staff, especially those members of the staff who have first-hand familiarity with the relevant facts. In a rule-making proceeding, the separation-of-functions provision does not apply, there being no adversary proceeding, and the agency may draw freely on the knowledge and experience of its staff. It seems clear that an agency's ability to formulate substantive standards must be impaired when full access to its own staff is denied.

(5) The very conception of a rule having application beyond the facts and parties of the particular case, in contrast to an order or judgment, suggests the relative unsuitability of adjudication as a method of rule-making. Rule-making through adjudication is not always completely fair and evenhanded in its results. This is especially true where a practice sought to be eliminated is industry-wide and the agency sues the members of the industry one by one to stop the practice. The firm that first becomes subject to a final order or decree will be placed at an unfair competitive disadvantage vis-a-vis its competitors; therefore each firm may feel compelled to litigate in order to preserve competitive equality. Since an order or judgment must be based on a finding of individual liability in respect of past practices, one or more firms, though within the rule properly applicable to the industry as a whole, may be able to obtain dismissal of their complaints (e.g., for failure of proof) and thereby enjoy a competitive advantage over those firms that are under order.

Such inequities are inevitable concomitants of industry-wide regulation by the case-by-case adjudicative method. The Supreme Court has therefore held, with specific reference to the Federal Trade Commission, that the courts are not to attempt themselves to redress such inequities.[127] But a rule promulgated in a formal rule-making proceeding is uniform and prospective in its application. With its promulgation, all who are subject to it stand alike, subject to exactly the same duties.

(6) Rule-making exclusively by adjudication tends to divert an agency from performing perhaps its primary and most salutary function, which is to provide guidance to the businessmen subject to its jurisdiction as to the requirements of law and thereby obviate the waste and uncertainty of litigation. The focus in adjudication is on settling a dispute over past practices, and while a rule may be announced in the process, it tends to be done incidentally and without sufficient concern for laying down clear guidelines for the future. Most often, rules contained in adjudicative decisions, whether judicial or administrative, are not designated as rules or stated in the form of rules. The rule must be inferred from the language of the opinion and the facts of the case; it is implicit rather than explicit; and it may remain controversial and uncertain until many subsequent adjudications have refined and clarified it. It may take a long time for a rule even to be recognized and understood as such.

The importance of rules which are understood from the outset as defining—clearly, comprehensively, and particularly—the lawful limits of future conduct is enhanced in the context of an agency, such as the Federal Trade Commission, whose role is preventive rather than punitive and whose task is the supervision of trade practices of competing businessmen. As noted in Part IV of this report, the original proposals for a trade commission were supported by the business community, which hoped that greater certainty could be introduced into trade regulation law; and in giving the Commission a sweeping mandate but limited remedial powers—precatory rather than truly injunctive—Congress probably assumed that once the Commission clearly defined a practice as unfair, businessmen would abandon it. It is a fair assumption, surely, that so long as competing businessmen "know where they stand and that they all stand alike" (Friendly, op. cit. supra note 132, at 7) they are not likely to violate the law; that in the trade regulation area, at least, law violations stem more from competitive pressures and legal uncertainty than from wilfulness; and that, therefore, a formal rule, clearly designated as such, which states the requirements of law clearly and particularly and has a uniform prospective application to a whole industry will frequently be a more effective method of law enforcement, encouraging voluntary compliance and discouraging litigation, than the conventional case-by-case method.

> Businessmen are glad, as a rule, to lend their support to voluntary and simultaneous abandonment of bad practices. They welcome the chance to wipe the slate clean. The overwhelming majority are unwilling to stoop to unfair tactics. At times some may feel that they must do so in order to meet in kind the unfair or unethical competition of less scrupulous competitors. It is often the case that various concerns would like to abandon their use of unfair or unethical methods if they can but be assured that their competitors will likewise stop and not take advantage of the situation. [T.N.E.C. Monograph No. 34, Control of Unfair Competitive Practices Through Trade Practice Conference Procedure of the Federal Trade Commission, p. 15 (1941).]

(7) If the tribunal in an adjudicative proceeding is too intent upon fashioning rules for future guidance, the task of rendering a fair result on the record before it may be slighted. Since the task of assessing individual liability on the basis of past practices and the task of fashioning rules of general application for future guidance are different, it has been argued that a tribunal which seeks to lay down broad rules in deciding individual cases may frequently fail to do complete justice to the parties before it.

(8) Rules made in adjudicative proceedings are ordinarily retroactive in application, while, under the Administrative Procedure Act, rules made in formal rule-making proceedings (including, of course, trade regulation rules) are prospective only (§ 2(c)). Retroactive application of a rule may often result in hardship. This is especially so where the rule embodies a novel legal principle and, therefore, is not readily foreseen. In a formal rule-making proceeding, the possibility of undoing consummated trans-

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[127] "In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." Moog Industries v. F.T.C., 355 U.S. 411, 413 (1958) (per curiam). See Note, 13 Rutgers L. Rev. 315 (1958).

actions is excluded. Many authorities, including the Supreme Court, have on this ground urged the administrative agencies to act where possible prospectively through rule-making proceedings.[138] It is fairer; it tends toward more equal treatment of competitors; and it may obviate hard-fought, protracted litigation induced by unwillingness to submit to harsh sanctions.

Although cease-and-desist orders of the Federal Trade Commission, like rules, speak to the future, they often carry retroactive consequences. Suppose that a firm, acting in good faith, adopts a trade name which the Commission later challenges as deceptive and, after prolonged litigation, orders excised; the firm is deprived of the value of its investment in the trade name, which may be very considerable. The matter would stand quite differently if prior to adopting the trade name the legality of the firm's action had been clearly defined in a trade regulation rule.

(9) Because a rule-making proceeding looks to the future rather than to the past, it avoids the stigmatization of persons as law violators. One of the principal reasons why our legal traditions require so extensive an array of procedural safeguards to be afforded in adjudicative proceedings is that it is a grave step to adjudge a person or firm guilty of unlawful conduct. Not only may such a judgment have practical effects, i.e., as the basis of remedial or punitive sanctions, but it carries with it an inescapable element of moral condemnation. It is not unusual for a violation of law to be adjudged on the basis of a rule first declared in the very case, reflecting a new and perhaps unforeseen view of the law, and grounded in general facts or considerations not to be found in the actual record of the case. Businessmen naturally resent being branded as law violators in such a situation, and for that reason alone may be more inclined to engage in hard-fought litigation. Establishing substantive standards or principles in formal rule-making proceedings avoids this problem: a rule finds no one guilty.

(10) Rule-making through adjudication may often be a prohibitively time-consuming, costly, and inefficient method of dealing with a problem common to an entire industry. Because of the procedural rights and safeguards which are a respondent's due in administrative, no less than in conventional civil or criminal, litigation, adjudicative proceedings before an agency are, beyond a point, irreducibly slow and costly affairs. These factors are greatly magnified where the practice sought to be suppressed is industry-wide and many proceedings, rather than one, must therefore be conducted at the same time. In such a situation, reliance on the case-by-case adjudicative method not only may strain the agency's, and the respondents', resources, and delay effective relief indefinitely, but it may also involve considerable waste and duplication of effort, since common issues of fact are bound to recur throughout the series of proceedings.

A rule-making proceeding affords an economical method of consolidating common issues of fact and law in a streamlined, but comprehensive and fair, proceeding having few of the cumbrous attributes of litigation. Since such a proceeding does not present questions of assessing individual guilt or innocence for past conduct, the strict procedural and evidentiary requirements of litigation are inapplicable.

We have indicated ten reasons why a formal rule-making proceeding may be preferable to an adjudicative proceeding, or series of adjudicative proceedings, from the standpoint both of government and the affected private parties, where the problem is one of fashioning a substantive standard to guide future conduct; and there are others. It is not surprising that the Supreme Court, and critics of the administrative process, have urged the agencies to give greater emphasis to rule-making proceedings.[139] We do not suggest, however, that the agencies in general, or the Federal Trade Commission in particular, should abandon reliance on the adjudicative method in all situations where a substantive principle or standard of conduct having general application is to be declared. The force of each of the reasons discussed above varies with the concrete situation in which a choice between approaches is presented. That is why the Supreme Court has held that the choice between rule-making and adjudicative proceedings is ordinarily within the agency's discretion.[140] The immediate question, then, is not whether rule-making through formal rule-making proceedings is in general preferable to rule-making through adjudicative proceedings, but whether, and to what extent, it is preferable in the present situation, which involves determining the requirements of the Trade Commission Act with respect to cigarette advertising and labeling in the light of the health hazards of cigarette smoking.[141] Concretely, what is the bal-

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[138] "Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct. * * * The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." S.E.C. v. Chenery Corp., 332 U.S. 194, 202 (1947). See Landis, op. cit. supra note 132, at 86–87; Friendly, A Look at the Federal Administrative Agencies, 60 Col. L. Rev. 429, 437 (1960). Cf. Friendly, op. cit. supra note 132, at 20.

[139] See S.E.C. v. Chenery Corp., 332 U.S. 194, 202 (1947); Friendly, supra note 138, at 436–37, 442–43; Friendly op. cit. supra note 132, at 143–47; Bernstein, Regulating Business by Independent Commission 179–82 (1955). "[I]n general, rule-making is a sounder way of proceeding than the case-by-case method or general declarations of policy and * * * wherever appropriate, it should be employed. * * * [E]very consideration of sound administrative procedure and fair play argue for following the rule-making route, where it can be employed." Baker, supra note 133, at 671. This principle has been stated with particular reference to the Trade Commission:

"The definition of unfair competition by administrative legislation is incomparably superior to definition by administrative decision. The method of judicial exclusion and inclusion does not permit of a sustained, consistent, comprehensive and speedy attack upon the trade practice problem. The case-by-case determination takes years to cover even a narrow field; it leaves wide lacunae; false starts are difficult to correct and the erroneous decision is just as prolific as a sound ruling in begetting a progeny of subordinate rules. In a controversy between two litigants or between a Commission and a private party, the law making function is distracted by factors which are important to the contestants but irrelevant to the formulation of future policy. The fusion of law and economics, the detailed investigations and hearings, and the precise formulation of rules, all of which are so essential to a proper regulation of competition, are not feasible when law making is but a by-product of the adjustment of controversies. The combination of the two functions may have been justified when knowledge of the workings of competition was sparse and objectives ill-defined. It can no longer be justified today. It would be little short of criminal to rely upon so inefficient a method of law making when more scientific and expeditious devices are available. * * * Hence we should resort to administrative legislation, at least so far as federal control of practices in interstate commerce is concerned. The administrative tribunal would have several functions. On the legislative or law making side, it would be charged with the duty of maintaining an unremitting study of the trade practice problem. It would, by rules and regulations, under a proper delegation of power and a clear definition of the standards by which it is to be guided, make additions to the general code of unfair competition. These additions would be preceded by investigation and public hearing and proposed drafts would be subject to extended criticism and study before enactment. It would also, upon proper showing, grant exemptions to particular industries from such provisions of the general law as operated harshly. Such exemptions would rarely be necessary but administration should be flexible enough to take care of the need should it arise. It would also, after thorough investigation, hearing and study, draft regulations for the facilitation, preservation, and regulation of competition for specific industries. These regulations would differ from N.R.A. codes in several vital respects. First, they would deal with the prohibition of competitive practices and not with the rehabilitation of industry or the rationalization or elimination of competition. Hence they would not be subject to the charge of regimentation. Secondly, they would be drafted by government and not by industry. Industry would be heard as in the formulation of a piece of legislation but it would not propose or command. Thirdly, the scope of the regulations would be more modest. Only practices which are demonstrably unsocial and uneconomic and which require separate industrial treatment would be thus attacked." Handler, Unfair Competition, 21 Iowa L. Rev. 175, 259–61 (1936).

[140] S.E.C. v. Chenery Corp., supra note 139, at 202. See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954).

[141] Baker, supra note 133, at 671, n. 60, states that his conclusions regarding the preferability of rule-making proceedings (see note 139, supra) have little applicability "to agencies such as the National Labor Relations Board or Federal Trade Commission, which are largely concerned with adjudicatory evidentiary questions whether some specified unfair practices have been

ance of advantages and disadvantages in proceeding by the trade regulation rule route in dealing with this particular problem?

To begin with, the problem is a general one. It is a problem of the legal responsibilities of an entire industry, not an individual firm. The cigarette industry would doubtless feel that the Commission was acting inequitably if it picked and chose among the cigarette manufacturers, suing some but not others. The principal considerations that must influence decision in this area—the nature of the health hazard, consumer knowledge of it, the amount and concentration of cigarette advertising in certain media, the problem of youthful smoking—pertain more or less equally to all of the cigarette manufacturers, who are, of course, competitors. The situation plainly calls for uniform, consolidated treatment, not separate lawsuits.

Moreover, the problem raises novel issues of policy. Although, in our opinion, established legal principles support, and indeed compel, the conclusions respecting the legal duties of the cigarette manufacturers reached in this report, the application of these principles in the circumstances presented is a matter of wide interest and concern. It is fairer to the industry as well as to the public that it be approached on a uniform and prospective basis in a proceeding specially tailored to the task of clear and comprehensive definition of the requirements of law to which the industry is subject. The industry, we are confident, supports the Commission's position that little constructive purpose would be served by proceedings in which the lawfulness of past practices in cigarette advertising, and the individual liability of particular manufacturers, were probed. The trade regulation rule promulgated herewith does not attempt to impute blame for past cigarette advertising practices. It is in no sense punitive, but preventive. It states the requirements of law for such practices, and it does so uniformly, clearly, and prospectively.

3. *The Commission's authority to conduct a trade regulation rule-making proceeding.* In the preceding section, it was demonstrated that the trade regulation rule procedure offers a more practical approach to the effective fulfillment of the Commission's statutory responsibilities in the area of cigarette advertising and public health than the conventional method of separate lawsuits. It is contended, nevertheless, that the Commission has not been granted by Congress the power to conduct such a proceeding; that it is confined to the cease-and-desist order adjudicative procedure provided in section 5(b) of the Trade Commission Act. The contention has far-reaching significance. If well founded, it would, because of the factors discussed above, preclude the Commission from acting effectively in matters, such as the present one, which, though they are clearly within the Commission's statutory jurisdiction and responsibilities, and of public importance, are not amenable to sound, expeditious and effective handling under the 5(b) procedure.

The contention is refuted by the language and scheme of the Trade Commission Act. Section 5(a)(6) of the Trade Commission Act provides that "[t]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." This, the Commission's basic mandate, is distinct from Section 5(b). There is no indication that the latter was intended to limit the broad grant of power in 5(a)(6). Section 5(b) simply establishes one procedure for implementation of the Commission's duty to prevent unfair methods of competition and unfair or deceptive acts or practices. That this procedure is not exclusive or mandatory is shown by the language of 5(b): "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been using or is using any unfair method of competition or unfair or deceptive act or practice in commerce, *and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint.* * * *" (Emphasis supplied.) The Commission is directed to use the 5(b) procedure only where it believes a 5(b) proceeding would be in the public interest. Moreover, use of the procedure presupposes a preliminary determination that the respondent has, or is currently, engaged in unlawful conduct.[142] The 5(b) procedure, in short, is distinctly narrower than the 5(a)(6) mandate, which does not require violations of law to be shown before the Commission may act to prevent them.

Section 6(g) of the Trade Commission Act authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of this Act", and thus establishes another method by which the Commission can proceed in the discharge of its statutory responsibilities as defined by 5(a)(6). The trade regulation rule procedure is clearly embraced by the literal terms of the section, and nothing in the legislative history of the Trade Commission Act requires that the provision be read other than as written.[143]

Even if 6(g) were not in the Act, it could not be persuasively maintained that the trade regulation rule procedure is ultra vires. It is implicit in the basic purpose and design of the Trade Commission Act as a whole, to establish an administrative agency for the prevention of unfair trade practices, that the Commission should not be confined to quasi-judicial proceedings. The Commission was created because the courts had not been able to build up a coherent and progressive body of trade regulation law, and because Congress found it completely impractical itself to define with particularity the trade practices that contravened public policy and ought therefore to be proscribed. The Commission was established not as a simple law-enforcement agency, but as an administrative agency comparable to the Interstate Commerce Commission, in order to perform a positive role of policy formulation which the courts, it seemed, could not adequately play in the trade regulation area. Since the Commission was given, specifically in section 5(a)(6), the function of defining and particularizing, as well as enforcing, the substantive requirements of the Trade Commission Act, it is a reasonable inference that Congress did not intend to deny to the Commission the use of procedures, such as the trade regulation rule procedure, which may be necessary to fulfill that function.

That the Commission was not envisioned as a conventional law-enforcement agency, concerned primarily with assessing liability on the basis of past acts, is suggested by the form of proceeding specified in section 5(b). As mentioned earlier 5(b) in its original form empowered the Commission to issue, not a final and binding order in the nature of

committed." We agree that where such issues are presented—and that may be in the majority of situations within the Commission's jurisdiction—rule-making proceedings are inappropriate. The question is whether or not this particular proceeding involves a different kind of issue.

[142] Compare Section 15 of the Clayton Act, 15 U.S.C. § 25 which authorizes the Attorney General "to institute proceedings in equity to prevent and restrain * * * violations [of the Act]." (Emphasis added.)

[143] It is a familiar canon of statutory construction that where the meaning of a statute is clear and unambiguous on the face of the statute, there is no occasion to look to legislative history. E.g., Caminetti v. United States, 242 U.S. 470 (1916); 2 Sutherland, Statutory Construction § 4502 (3d ed. 1943). Nevertheless, the spokesman for the cigarette industry argued in this proceeding that the legislative history of the Federal Trade Commission Act of 1914 makes clear that the Commission was not intended to promulgate "substantive" rules. (R. 83-K to 83-M.) However, by "substantive" rules the spokesman meant, as has been mentioned (see note 131, supra), rules having the force and effect of law—not trade regulation rules. At most, the legislative history suggests that the Commission was not intended to promulgate "legislative" rules. For example, Judge Covington, a member of the Conference Committee, remarked: "The Federal Trade Commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature." 51 Cong. Rec. 14932 (1914). There are, to be sure, references in the legislative history to the "quasi-judicial" nature of the Commission (cf. S. Rep. No. 1705, 74th Cong., 2d Sess. 2 (1936)), and statements such as, Section 5 "empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing" (S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914)). But such remarks do not seem to have been concerned with limiting the Commission's rule-making powers, conferred expressly in Section 6(g). Their point, rather, was (1) that the Commission has quasi-judicial powers, and is not limited to the investigatory role originally envisaged for it, and (2) that the Commission can only enter a cease and desist order on the basis of a trial-type hearing in which the procedural safeguards of the judicial process are afforded.

an injunction, but an advisory type of order. Even in its present form, 5(b) does not in terms provide for a trial-type hearing, but only for a summary proceeding to show cause. The framers of the Trade Commission Act sought to create an agency that would introduce certainty into the law of unfair trade practices and thus provide guidance for American businessmen. For this purpose a full complement of judicial-type procedures and sanctions was deemed unnecessary.

Finally, the detailed structure of the Trade Commission Act refutes the argument that Congress intended to force the Commission within a narrowly adjudicative mold. The Act established an administrative agency, not an administrative court. It gave the agency responsibility not merely to adjudicate, but also to initiate, proceedings. It endowed the agency with extensive powers of investigation and inquiry (see, e.g., sec. 6(b) of the Act). Since Congress plainly wished to depart from rather than imitate the judicial method of legal administration, we are not persuaded that, in specifying a procedure for obtaining a cease-and-desist order, Congress thereby precluded preventive procedures other than a formal cease-and-desist order proceeding.

4. *The bearing of trade practice rules.* The contention that the Commission has no authority to conduct a rule-making proceeding such as the present one is particularly untenable in view of the Commission's long-established, and concededly valid, trade practice rule procedure. "Trade practice rules are designed to eliminate and prevent, on a voluntary and industrywide basis, trade practices which are violative of laws administered by the Commission. The rules interpret and inform businessmen of legal requirements applicable to the practices of a particular industry and provide the basis for voluntary and simultaneous abandonment of unlawful practices by industry members. Failure to comply with such rules may result in corrective action by the Commission under applicable statutory provisions." [144]

No provision of the Federal Trade Commission Act, unless it be Section 6(g), authorizes the Commission in so many words to conduct this kind of rule-making proceeding, whereby unlawful practices are sought to be prevented on an industry-wide basis,[145] yet the Commission has conducted such proceedings, in one form or another, since at least 1920. [146]

Many trade practice rules have long been viewed as actually stating the substantive requirements of the Trade Commission Act, and, accordingly, as being enforceable by the Commission and not merely voluntary. "The unfair trade practices which are embraced in group I rules are considered to be unfair methods of competition within the decisions of the Federal Trade Commission and the courts, and appropriate proceedings in the public interest will be taken by the Commission to prevent the use of such unlawful practices in or directly affecting interstate commerce." [147] Trade practice rules have been relied upon by the Commission in subsequent adjudicative proceedings to support findings of unlawfulness. The courts have upheld the Commission in so relying.[148] As a practical matter, then, trade practice rules are not merely voluntary and advisory; they are, in many instances, enforceable and enforced. (See Comment, 62 Yale L.J. 912, 935, 941–43 (1953).) As shall appear, the difference between trade practice and trade regulation rules is one of degree, not of kind.

The foregoing discussion also answers the argument that the trade regulation rule procedure is invalid because the Commission first utilized it many years after the passage of the Trade Commission Act in 1914. The Supreme Court has held that the Commission's failure to exercise authority delegated to it in the Act until a number of years has elapsed does not justify a conclusion that the authority was never delegated. United States v. Morton Salt Co., 338 U.S. 632, 647–48 (1950). But Federal Trade Commission rule-making is, in any event, no recent phenomenon. The trade regulation rule procedure is not a sudden innovation, but a natural outgrowth of the trade practice rule procedure. It is thus the culmination of more than forty years of Commission rule-making.

The existence and unchallenged validity of the trade practice rule procedure also refute the position (which is untenable in any event in light of the clear language of Section 6(g)) that the trade regulation rule procedure is unauthorized because not specifically referred to in the Trade Commission Act. Even though trade practice rules are obviously outside the framework of the Section 5(b) procedure, the Commission's authority to promulgate them is conceded, evidently because they represent a far less drastic exercise of administrative power than cease-and-desist orders. A cease-and-desist order is predicated on a finding that the law has been violated. It adjudicates guilt and innocence; a trade practice—or trade regulation—rule does not. Violation of a cease-and-desist order lays a person or firm open to severe civil penalties or contempt sanctions; there are no penalties or sanctions for violation of a trade practice—or trade regulation—rule. The 5(b) powers of the Commission are, therefore, far more drastic than its rule-making powers. The explicit vesting of the Commission with those more drastic powers does not compel an inference that the less drastic powers have been withheld.[149]

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[144] Section 1.62, Procedures and Rules of Practice (effective Aug. 1, 1963). The procedure for promulgating trade practice and trade regulation rules is the same. See Section 1.61. The lawfulness of the trade practice rule procedure appears to be settled. H.R. Rep. No. 3236, Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department of Justice—A Preliminary Report, 81st Cong., 2d Sess. 31 (1951) ("the question of legality would seem to be a dead issue"); Comment, Trade Rules and Trade Conferences: the FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations, 62 Yale L.J. 912, 918, n. 45 (1953) (legality of procedure termed "unquestionable"). "That it is within the competence of the Federal Trade Commission to promulgate these [Trade Practice] Rules in the public interest is not challenged. * * * As these Rules are applicable alike to all members of the industry, petitioner must comply with them." Prima Products, Inc. v. F.T.C., 209 F. 2d 405, 408 (2d Cir. 1954). The Tobacco Institute, in this proceeding, appears to concede the lawfulness of the trade practice rule procedure (R. 83–P). As of 1961, trade practice rules were in force in 162 industries. F.T.C. Ann. Rep., 1961, p. 64. For a current list of such rules, see 4 CCH Trade Reg. Rep., pp. 42002–8.

[145] By the same token, nothing in the language of Section 5(b) specifically authorizes the kind of full-fledged trial-type hearing which the Commission customarily afforded in cease-and-desist proceedings long before the enactment of the Administrative Procedure Act.

[146] In F.T.C. Ann. Rep., 1920, p. 43, there is a description of the "trade practice submittal" procedure, which was the precursor of the trade practice rule procedure:

"This procedure was instituted by the Commission as an instrument to assist the proceedings provided by statute for the elimination of unfair methods of competition. It had its origin in an effort to eliminate, simultaneously and by the consent of those engaged in a given industry, practices which, in the opinion of the industry as a whole, were unfair. The trade submits its trade practices to the commission for the commission's information. It is employed in cases where a large number of complaints come to the commission, usually from persons in the industry, respecting a number of alleged unfair practices generally prevalent in the industry, or respecting some practice which although of ancient and widespread usage in the trade is questioned. In such instances the commission has at times felt that a single proceeding might not present all the facts or that a single order, restraining as it would but a single concern, might tend to be harmful rather than corrective."

And as early as 1916, the Commission was issuing "conference rulings", i.e., advisory opinions. "[T]he Commission has interpreted, upon request, the laws which it is empowered to enforce." F.T.C. Ann. Rep., 1916, pp. 12–13; see id., pp. 52–59.

[147] F.T.C. Ann. Rep., 1935, pp. 96–97. Thus, the "group I" rules are mandatory, not voluntary or permissive. For a full description of the group I-group II distinction, see T.N.E.C. Monograph No. 34, Control of Unfair Competitive Practices Through Trade Practice Conference Procedure of the Federal Trade Commission, pp. 4–6 (1941).

[148] See Prima Products, Inc. v. F.T.C., 209 F. 2d 405 (2d Cir. 1954); Northern Feather Works, Inc. v. F.T.C., 234 F. 2d 335 (3d Cir. 1956); Buchwalter v. F.T.C., 235 F. 2d 344 (2d Cir. 1956); Lazar v. F.T.C., 240 F. 2d 176 (7th Cir. 1957); Burton-Dixie Corp. v. F.T.C., 240 F. 2d 166 (7th Cir. 1957).

[149] The question of the Federal Trade Commission's rule-making authority invites comparison with that of the rule-making authority of the National Labor Relations Board. Like the Commission, the Labor Board has jurisdiction over certain kinds of practices in many industries, rather than comprehensive regulatory responsibilities in a particular industry. Like the Commission, the Labor Board has been given by Congress the task of implementing broad principles of fairness

B. *The use or effect of trade regulation rules in subsequent adjudicative proceedings.* The questions (1) whether the Commission is authorized to conduct this rule-making proceeding, and (2) what use the Commission may make of the rule in subsequent adjudicative proceedings, are logically distinct. In promulgating the present rule, the Commission desires to avert, not stimulate, litigation. It assumes that the rule will be obeyed without the necessity for subsequent cease-and-desist order proceedings. Rules that state the requirements of law with clarity and particularity, and are uniform and prospective in application, avoid uncertainties and reduce litigation. It is, therefore, premature to attempt in this report a definitive exposition of the consequences of violation of trade regulation rules. Nevertheless, since some of the witnesses at the public hearings in this matter appear to have had some difficulty in conceiving how rules can be other than "interpretive" or "legislative," and since trade regulation rules fit neither pigeonhole exactly, we shall attempt to describe briefly the intended use and effect of trade regulation rules in adjudicative proceedings brought subsequent to their promulgation.

If the only significance of trade regulation rules were as a vehicle for announcing Commission policy, they would be rather similar to trade practice rules. Both types of rule offer interpretation of the laws administered by the Commission, not in the context of assessing liability for past practices, but by way of furnishing guidance for the future concerning the Commission's views of the requirements of law as applied to a particular problem. If this process is unobjectionable under the rubric of trade practice rules, it should be equally unobjectionable under the rubric of trade regulation rules.

It is true that in trade practice rule proceedings the initiative is ordinarily with the industry rather than the Commission. The object is to devise rules that will be acceptable to the industry members and that the Commission can approve. In trade regulation rule proceedings, the initiative is typically the Commission's, and the rules may be adopted even if the consent of the industry members is not forthcoming. Trade regulation rules are, therefore, a more deliberate and more formal embodiment of Commission views and perhaps a more reliable index to the Commission's enforcement intentions than trade practice rules. But the difference is not fundamental.

In interpreting the laws administered by the Commission, are trade practice and trade regulation rules merely "advisory"? To be sure, one who violates such rules incurs no immediate sanction thereby. But where a rule correctly expresses the requirements of the law, one who disobeys the rule is, for all practical purposes, disobeying the law. Thus, when an agency's consideration of a problem has progressed to the point at which a specific legal standard has crystallized, it is plainly to the advantage of the persons who might be affected thereby that the agency announce its determination in a formal, public, explicit, and prospective manner. Otherwise such persons may violate the law and incur heavy sanctions because of uncertainty as to the law's requirements.

There is a more significant difference between trade practice and trade regulation rules than any we have yet touched upon. An example should make this difference clear. Suppose that there is a trade practice rule for the dry-cell battery industry which forbids the advertising of dry-cell batteries as leakproof. No factual determinations would accompany such a rule, since trade practice rules ordinarily rest upon industry agreement. In the event that a battery manufacturer did not comply with the trade practice rule, and the Commission issued a complaint against him under Section 5(b) alleging that he had committed a deceptive act or practice in advertising his battery as "leakproof," the Commission would not be able to rely on any determination, made in the trade practice rule proceedings, that no battery is leakproof, because no determination would have been made. In the adjudicative proceeding the Commission could not utilize the trade practice rule to resolve any disputed issue of fact, or to dispense with the introduction of evidence required to make out a prima facie case. The Commission would be obliged to prove de novo that the respondent's battery was not leakproof. However, in the case of a trade regulation rule, accompanied by and based upon determinations of fact made in accordance with statutory rule-making procedures, the Commission could, in a subsequent adjudicative proceeding, rely not only on the propositions of law contained in the rule, but also on the underlying factual matters determined.

The Commission may rely on fact-findings made in a prior rule-making proceeding only to the extent that the rule-making proceeding afforded a fair and proper procedure for making the particular factual determinations sought to be relied on, and did not infringe the respondent's right to have a full, trial-type hearing in any Section 5(b) proceeding. Not all issues lend themselves to determination in a rule-making proceeding; some can be determined only in an adjudicative proceeding embodying a complete panoply of evidentiary and procedural rules and safeguards. A rule-making proceeding would, for example, be inappropriate for resolving factual issues turning on witnesses' credibility, memory, or powers of observation. Adjudicative fact-finding is specifically designed for the resolution of such kinds of issues. Where, however, factual matters are essentially uncontroverted, or otherwise do not demand exclusively adversary presentation and adjudicative determination, it may be fair and proper to determine them in a rule-making proceeding, and then rely on the determination made therein in subsequent adjudicative proceedings in which the matters are relevant.

It was pointed out earlier that a conclusion that a particular course of conduct is unlawful may rest not only upon evidence, i.e., facts developed according to the procedures of adjudication, but also on background or "legislative" facts, or broad considerations of law, policy and discretion, or the accumulated knowledge and experience of the agency.[150] Nonevidentiary "facts" of this sort are not required to be determined adjudicatively. Often they cannot be so determined. If, therefore, they have been determined in a rule-making proceeding in which the procedures ordained by the Administrative Procedure Act and the agency's own rules have been fully complied with, it should not be required that they be redetermined de novo in a subsequent adjudicative proceeding.

The factual determinations upon which the trade regulation rule promulgated herewith are based concern (1) the health hazards of cigarette smoking; (2) cigarette sales and advertising expenditures by year, brand, and type of cigarette, cigarette advertising media and audiences, etc.; (3) consumer reactions, attitudes and behavior, and the probable impact of cigarette advertising on consumers. It has already been explained why the Commission may, with propriety, accept the determinations made in the Report of the Surgeon General's Advisory Committee (see Part II, supra). The second category is limited to strictly background data which have been drawn from sources whose accuracy is generally conceded and has not been challenged in this proceeding. The right to a trial-type hearing is not infringed by relying on such data.[151]

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in an area where specialized knowledge and experience are necessary. Thus the Board's task, like the Commission's, has been inescapably "quasi-legislative" in character, as well as "quasi-judicial." Yet the Board, even more than the Commission, has relied on adjudication for formulating policy, and the bar has urged the Board to utilize its rule-making powers. (See Peck, supra note 133; Report of the Committee on Agency Rule-Making of the A.B.A. Administrative Law Section, 11 Ad. L. Bull. 280 (1959); Recommendation of the A.B.A. Lab. L. Sec., 42 Lab. Rel. Rep. 513 (1958); Note, Administrative Law Making Through Adjudication: The National Labor Relations Board, 45 Minn. L. Rev. 609, 656 (1961).) The Board has been granted rule-making authority in much the same language as Section 6(g) of the Trade Commission Act. "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." Section 6 of the National Labor Relations Act, 29 U.S.C. § 156. It has been assumed that the Board has authority to conduct formal rule-making proceedings.

[150] See 2 Davis, Administrative Law, ch. 15 (1958). "Legislative facts are typically general facts which help the tribunal decide issues of law and policy. Adjudicative facts are facts about the parties, the facts to which law and policy are applied in an adjudication." 2 id., § 15.14, p. 433.

[151] In the words of Mr. Justice Holmes, "The court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law." Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924). See Wyzanski, A Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1295 (1952). Surely it is appropriate that such facts be determined systematically in a rule-making proceeding tailored to that purpose, rather than be left to find their way, perhaps somewhat haphazardly, into adjudicative decisions in which new rules of law are announced.

As for the third category, it was pointed out in Part IV of this report that the meaning of particular advertisements, the understanding of consumers, and related questions as to the impact or effects of advertising on the consuming public, while they are deemed to involve matters of "fact" to be determined by the Commission, ordinarily depend, not upon evidence (apart from the advertisements themselves), but upon the Commission's exercise of its specialized knowledge and experience of marketing practices and consumer reactions. The Commission is, of course, making no judgment in this proceeding with respect to any deceptive or unfair characteristics of particular cigarette advertisements or of cigarette advertising. There is no "adjudicative" question here, for example of whether a particular advertisement is likely to deceive a substantial segment of the consuming public or whether any cigarette advertiser has committed unfair or deceptive acts or practices. However, the Commission has considered and based the rule on such general background matters as the probable impact on consumers of cigarette advertising that does not disclose the health hazards of smoking, in view of the amount of advertising, media employed, the general advertising themes that have been used, the nature of the advertised product, the characteristics of the advertising audience, the publicity that has been accorded the smoking and health controversy, and so forth.

It should be noted in this connection that the facts upon which the trade regulation rule is based are common to the entire class of persons subject to the rule, i.e., all of the members of the cigarette industry. Such facts are obviously suitable for consolidated treatment in a single proceeding, not only on grounds of economy and expedition, but on grounds of fairness as well. It is to the advantage of the cigarette manufacturers that such facts be treated together. Were the Commission to bring separate cease-and-desist order proceedings against the individual manufacturers, it would, to be sure, be necessary to establish the essential elements of the Commission's case separately in each proceeding. However, after a series of such proceedings, it would be entirely proper for the Commission, in the next case, to take official notice of the records of and its findings in the prior cases, thereby dispensing with the need to establish a prima facie case anew,[152] even though the respondent in the later case had not been a party to the earlier proceedings. By conducting a single, consolidated proceeding, the Commission has assured all of the cigarette manufacturers an opportunity actually to participate in making such determinations as the Commission may, in future adjudicative proceedings, rely upon.

The Commission may, in subsequent adjudicative proceedings, take official notice of its accumulated knowledge and experience as embodied in the record of a trade regulation rule proceeding, just as it may take official notice of such knowledge and experience as embodied in a series of prior adjudicative records and just as it may rely upon matters outside of any record if they are within the class of matters traditionally regarded as background or legislative facts or matters of law, policy and discretion. This proceeding simply enables the systematic marshalling of the Commission's knowledge and experience in the field of cigarette advertising and of consumer protection generally.

What rights would a respondent in such a later adjudicative proceeding have to notice of and opportunity to rebut findings made in reliance on prior determinations in a trade regulation rule proceeding? Section 7(d) of the Administrative Procedure Act provides, "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." (See also § 3.14 (d) of the Commission's Procedures and Rules of Practice.) This does not mean that whenever an agency relies on matters outside of the record to determine an issue in an adjudicative proceeding, the respondent must be given an opportunity to introduce evidence on rebuttal.[153] That makes little sense where it is nonevidentiary facts that have been noticed.

Nor does the Administrative Procedure Act require that the Commission provide, in a subsequent rule-making proceeding or otherwise, a further opportunity for persons who were afforded a full and ample opportunity to participate in the original rule-making proceeding—who were, as here, on notice of the matters of fact, law, policy and discretion on which the agency relied in formulating its rule, and had complete opportunity to submit in written and oral form any views, data and argument they chose[154]—to introduce further data, at least in the form of record evidence, on matters fully and fairly canvassed in the original proceeding, so long as the matters are of the kind that may with propriety and fairness be determined in a nonadjudicative proceeding. While in other cases of official notice (e.g., notice of the record of a prior case) the respondent's first "opportunity to show the contrary" occurs in the adjudicative proceeding in which notice is taken (the respondent not having been a party in the prior case), here the cigarette companies have been given such an opportunity in the very proceeding the record of which may be noticed in a future adjudicative proceeding. The Administrative Procedure Act does not require that the same person or firm be offered an indefinite number of "opportunities to show the contrary."

What the Administrative Procedure Act and basic principles of fair procedure do require, in the way of "an opportunity to show the contrary," is that any person or firm subject to a trade regulation rule be given an opportunity to show changed conditions, or other special circumstances, justifying a waiver of the rule as to him.[155] Such opportunity is expressly provided for in the present trade regulation rule.[156] Moreover, such person is free, in any adjudicative proceeding in which the Commission gives notice of its intention to rely on the determinations made in this proceeding, to

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[152] See Section 7(d) of the Administrative Procedure Act. The doctrine of official notice was discussed by the Commission in its recent decision in Manco Watch Strap Co., F.T.C. Docket 7785 (decided March 13, 1962), a case involving nondisclosure of foreign origin:

"If this were the first foreign-origin product case to come before the Commission, the conclusion that a substantial segment of the public assumes that unmarked watch bands are American-made and prefers such domestically-made bands would have to be based on specific evidence. But this is not a case of first impression; rather, it follows scores, if not hundreds, of others involving fundamentally the same general factual issues. This is an area of administration that has evolved to a point at which the accumulated experience and knowledge of the Commission may properly be invoked in exercising its fact-finding functions. * * * In view of the frequency and consistency with which proof of the existence of such preference has been shown in countless prior proceedings, the Commission may take official notice of that fact, and dispense with the need to re-prove it in each new proceeding that is brought.

"Proof of general consumer attitudes and preferences in regard to the general class of products of foreign origin or manufacture would only prove again that which the Commission has already established to be the fact from its accumulated knowledge and experience. * * * Accordingly, we may now properly generalize the facts established by the Commission in the long line of foreign-origin cases and relieve the parties in this type of case of the unnecessary burden of continuing to litigate, over and over again, the same general factual issues as to consumer attitudes and preferences." (Pp. 9–11; see 2 Davis, op. cit. supra note 150, ch. 15.)

[153] Jaffe, Administrative Procedure Re-Examined: The Benjamin Report, 56 Harv. L. Rev. 704, 717–19 (1943); 2 Davis, op. cit. supra note 150, § 15.14, pp. 432–33. "[P]arties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." Id., p. 432. (Emphasis added.)

[154] This trade regulation rule proceeding complies fully with the notice and opportunity-to-participate requirements of Section 4 of the Administrative Procedure Act and Section 1.67 of the Commission's Procedures and Rules of Practice. See App. C, infra.

[155] See National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956); F.P.C. v. Texaco Inc., —— U.S. ——, —— (1964). Cf. Manco Watch Strap Co., F. T. C. Docket 7785 (decided March 13, 1962), p. 14: "where the Commission's complaint is predicated on the existence of a general consumer preference for American-made goods of which official notice is taken, the burden of showing that the particular case is exceptional and not within the general rule will rest on the respondent."

[156] The rule provides: "In the event that any person subject to this Rule is of the opinion that new or changed conditions of fact or law, the public interest, or special circumstances require that the Rule be suspended, modified, waived, or repealed as to him, or otherwise altered or amended, such person may file with the Secretary of the Commission a petition to reopen this rule-making proceeding, stating the changes desired and the grounds therefor. The Commission will act on the petition as provided in Section 1.66 of the Commission's Procedures and Rules of Practice."

introduce evidence bearing on adjudicative facts at issue in the later proceeding, as well as to argue questions of law. The trade regulation rule procedure thus involves no infringement whatever of any respondent's rights in a subsequent 5(b) adjudicative proceeding. Cf. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); F.P.C. v. Texaco Inc., —— U.S. —— (1964).

In sum, while nowhere in the Trade Commission Act is the Commission specifically granted the authority to promulgate a trade regulation rule for the advertising and labeling of cigarettes, such a rule is within the scope of the general grant of rule-making authority in Section 6(g), and authority to promulgate it is, in any event, implicit in Section 5(a)(6) and in the purpose and design of the Trade Commission Act as a whole. Within the limits stated above, the rule may be relied upon in subsequent adjudicative proceedings to resolve those factual matters that have been determined in the rule-making proceeding. The lawfulness of such an exercise of agency authority, in analogous circumstances has been upheld by the Supreme Court.[187]

VII. The Provisions of the Trade Regulation Rule and Manner of Compliance Therewith

In this part of the report we discuss briefly the provisions of the trade regulation rule promulgated herewith and the requirements of compliance with it. For reasons already stated, the rule contains no provisions corresponding to rules 2 and 3 of the proposed rules published at the outset of this proceeding. The substance of proposed rule 1 remains, but it has been modified to eliminate any requirement that a specific form or specific forms of words be used in disclosing in all advertising and labeling the health hazards of cigarette smoking. The Commission believes that the individual advertiser should be free to formulate the required disclosure in any manner that intelligibly conveys the sense of the required disclosure in a fully conspicuous fashion. The Commission will, on request, advise whether proposed forms of disclosure comply with the requirements of the rule.

In addition to the substantive provision requiring disclosure of the health hazards of smoking, the rule contains a procedural provision for the reopening of this rule-making proceeding in certain circumstances. This provision ensures that every cigarette manufacturer, in advance of any proceeding against him under Section 5(b), shall have a full and fair opportunity to demonstrate to the Commission such changed conditions or special circumstances as would warrant a modification of the rule. Besides this special provision, Section 1.66 of the Commission's Procedures and Rules of Practice provides that "any interested person or group" may file a petition with the Secretary of the Commission "for the amendment or repeal of a [trade regulation] rule." This section also permits the Commission to initiate sua sponte proceedings for the modification or repeal of a trade regulation rule.

The Commission's determination in this proceeding, embodied in the trade regulation rule, is in essence a definition of standards of conduct required by the Federal Trade Commission Act, and thus serves the function of informing the members of the cigarette industry of what the law prohibits them from doing in the area of cigarette advertising and labeling in relation to the health hazards of smoking. In promulgating such a rule, the Commission fulfills its statutory obligation, under Section 5(a)(6) of the Federal Trade Commission Act, "to prevent" persons subject to the law "from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce"; for Congress envisaged that once businessmen were informed, clearly, unequivocally and in advance, of what practices were deemed unlawful by the Commission, they would abandon them. It is the Commission's general policy, therefore—a policy no less applicable in the present matter than in other matters—to encourage voluntary, simultaneous and industry-wide abandonment of unlawful trade practices in order to avoid resort to formal enforcement proceedings and sanctions.

Because the Commission desires to encourage voluntary compliance with this trade regulation rule and recognizes that immediate conformity to the requirements of the rule may present practical difficulties for the industry, it has determined that, following the promulgation of the rule, the industry should be allowed a reasonable period of time for voluntary compliance. For example, questions may arise as to the interpretation and application of the rule in particular circumstances. The Commission's offices will be open for any industry member who has such a question to seek definitive advice, in advance, from the Commission. The Commission also recognizes that even though the rule imposes the minimum requirements necessary to bring the industry's conduct into conformity with Section 5 of the Trade Commission Act, it will necessitate changes in the present advertising and labeling of cigarettes that may require some time to implement.

Accordingly, the Commission has determined that, with respect to labeling, the trade regulation rule shall take effect on January 1, 1965. This will allow industry members ample time to bring their labeling into conformity with the rule. However, with respect to advertising, the Commission recognizes that additional problems may exist. The determinations made by the Commission in this proceeding and embodied in this report reflect past and present conditions, not the future. Neither the advertising nor the labeling of any cigarettes has ever carried a warning of the hazards to health of smoking. Nor has there been in this country any extensive educational program to inform the public, and especially young people, of those dangers. On the contrary, as we have found, cigarette advertising has been of such character and magnitude as to have the effect of obscuring awareness of the risks to health. Thus, if present conditions of cigarette merchandising continue unchanged, the public interest clearly requires the inclusion in all cigarette advertising of disclosure of the hazards to health of smoking. As has been shown (Part III supra), advertising has played a most important part in the marketing of cigarettes. In comparison to advertising, labeling has not been a major factor in merchandising the product. It is the Commission's determination, therefore, that, in the light of circumstances as they exist today, the members of the cigarette industry are under the legal duty to disclose the health hazards of cigarette smoking in advertising as well as labeling.

The Commission recognizes, however, that circumstances may change, and that such change may affect the public interest with respect to the need for such disclosure in cigarette advertising. The Commission expects that members of the industry will proceed promptly and in good faith to comply with the rule, insofar as it requires inclusion of a cautionary statement in all cigarette labeling. The Commission also expects that the members of the industry will proceed promptly and in good faith to eliminate voluntarily all deceptive or unfair elements from cigarette advertising. The Commission also anticipates that effective and sustained campaigns of public education as to the health hazards of cigarette smoking may soon be undertaken on a large scale by public health agencies, medical and health organizations, and indeed by the cigarette industry itself.

Accordingly, the Commission has determined that, with respect to advertising, the rule shall become effective on July 1, 1965. In view of the possibility of changed circumstances prior to such effective date, the Commission is making express provision in the rule for dealing with such changed circumstances should they occur. The Commission will entertain an application filed prior to May 1, 1965, by any interested party to postpone the effective date or otherwise suspend, modify, or abrogate the provisions of the rule as to advertising, upon a showing of such change in circumstances as to justify such requested action in the public interest. The Commission would welcome voluntary compliance by the industry or other changed circumstances which would obviate the need for formal enforcement proceedings or sanctions.

The Commission's objective in this proceeding has been to inform and guide, not to pass judgment upon past or present actions of the cigarette industry. Trade regulation rules are preventive, not punitive, in nature. They are intended to avert rather than promote liti-

[187] See National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); F.P.C. v. Texaco Inc., —— U.S. —— (1964). Thus, in the recent Texaco case the Supreme Court held: "the statutory requirement for a hearing . . . does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." —— U.S., at ——.

gation. The Commission desires neither to inflict economic injury on the cigarette industry nor to involve the members of the industry in cease-and-desist order proceedings. The Commission has therefore endeavored to prescribe a program of compliance that will involve a minimum of uncertainty, dislocation, and formal enforcement, and at the same time fully protect the public interest.

APPENDIX A

PAST COMMISSION PROCEEDINGS INVOLVING CIGARETTE ADVERTISING

I. Formal Actions.

(1) London Tobacco Co., 36 F.T.C. 282 (1943). Prohibits any words, pictures or other representations that any domestic product is imported.

(2) R. L. Swain Tobacco Co., 41 F.T.C. 312 (1945). Prohibits representations that respondent's cigarettes are endorsed or approved by the medical profession; will save or soothe the nose, throat or mouth; contains no irritating properties; will not produce cough, wheeze or throat irritation; will not produce sour, stale or disagreeable odor in closed room; produces less stain on fingers and teeth.

(3) P. Lorillard Co., 46 F.T.C. 735 (1950), order modified, id., at 853, affirmed, 186 F. 2d 52 (4th Cir. 1950), contempt proceeding, 6 F.T.C. Statutes and Court Decisions 490 (4th Cir. 1959). Prohibits representations that Beech-Nut cigarettes will not harm or irritate the throat; that filtering effect of extra length extends beyond point where the extra length is consumed; that Sensations contain the finest tobacco that can be bought; that Old Golds contain less nicotine or tars or is less irritating than any of the six other leading brands.

(4) R. J. Reynolds Tobacco Co., 46 F.T.C. 706 (1950); modified, 192 F. 2d 535 (7th Cir. 1951), modified order, 48 F.T.C. 682 (1952). Prohibits representations that Camels aid digestion; do not impair the "wind" or physical condition of athelte; will never harm or irritate throat or leave an aftertaste; are soothing, restful or comforting to the nerves; contain less nicotine than any of the four other largest selling brands.

(5) American Tobacco Co., 47 F.T.C. 1393 (1951). Prohibits representations that twice as many independent tobacco experts smoke Luckies or that those who do, do so because of their knowledge of the grades or quality of tobacco purchased by American; that Luckies contain less acid or nicotine or are less irritating to the throat than any of the other leading brands of cigarettes.

(6) Philip Morris & Co., Ltd., 49 F.T.C. 703 (1952), vacated and remanded on Commission's motion, 5 F.T.C. Statutes and Court Decisions 790 (D.C. Cir. 1953), dismissed upon affidavit of abandonment, 51 F.T.C. 857 (1954). Abandoned claims were to the effect that Philip Morris cigarettes will not irritate the upper respiratory tract; will not affect the breath or leave an aftertaste; and misrepresentations of the reasons for which any study, survey, experiment, test or the like was made.

(7) Liggett & Myers Tobacco Co., preliminary injunction denied, 108 F. Supp. 573 (S.D.N.Y. 1952), aff'd mem., 203 F. 2d 956 (2d Cir. 1953); 55 F.T.C. 354 (1958). Prohibits representations that Chesterfields have no adverse effect upon the nose, throat or accessory organs; are milder when used to connote that the smoke is less irritating than that of any other brand of cigarettes; will soothe or relax the nerves.

(8) Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960) (consent order). Prohibits using any pictorial presentation or demonstration relating to filter efficacy that does not prove what it purports to prove and representations that Life cigarettes are approved by the U.S. Government or have been found by this Government lower in tar and nicotine than any other filter cigarettes.

II. Stipulations.

(1) Batt Brothers Tobacco Products, Inc., 33 F.T.C. 1662 (1941). Prohibits claims as to English, French and Russian origin.

(2) Benson & Hedges, 33 F.T.C. 1659 (1941). Prohibits claims as to "non nicotine" as descriptive of mouthpiece or claims that said mouthpiece denicotinizes or appreciably removes nicotine from smoke.

(3) Brown & Williamson Tobacco Corp., 34 F.T.C. 1689 (1942). Prohibits claims that Kools will keep head clear in winter or any other time, give extra protection or is an excellent safeguard during cold months; remedy or protection from colds; easier on one's throat; leaves throat or nose cleaner or clearer; soothes, rests or relaxes throat or mouth; claims as to head clearing quality of menthol or that "doctors know the beneficial head clearing quality of menthol"; or in any way implying that a smoker of Kools receives therapeutic benefits for colds or any other condition.

(4) Brown & Williamson Tobacco Corp., 36 F.T.C. 1099 (1943). Prohibits claims that report of tests appearing in *Reader's Digest* proves that Avalon Cigarettes are the finest quality.

(5) Brown & Williamson Tobacco Corp., 43 F.T.C. 805 (1947). Prohibits claims that Raleigh cigarettes are right for the throat, that smoke from such cigarettes is beneficial to the throat or less harmful than the smoke from other cigarettes.

(6) Brown & Williamson Tobacco Corp., 46 F.T.C. 1240 (1950). Prohibits claims that Life cigarettes are safer for the throat or lungs, better for health, give safer smoking pleasure than other cigarettes, that said cigarettes or the smoke therefrom contain less irritating tare than other cigarettes or their smoke, that said cigarettes may be smoked to the full extent of one's desire without irritation or ill effects.

(7) Estabrook & Eaton Co., 35 F.T.C. 925 (1942). Prohibits claims that only Leighton Cigarettes contain nature-ripened tobacco, do not irritate throat and do not affect nerves.

(8) Green River Tobacco Co., 27 F.T.C. 1547 (1938). Prohibits claims that he sells all brands; only products he sells have natural flavor, mildness, coolness; that his prices are wholesale; that his products are not taxed.

(9) International Tobacco Co. of America, Inc., 33 F.T.C. 1650 (1941). Prohibits claims as to English manufacture, that its cigarette tips represent an original or revolutionary principle or are the only ones having filter tips.

(10) Julep Tobacco Co., 27 F.T.C. 1637 (1938). Prohibits claims that Julep cigarettes help counteract irritants, throat irritations due to heavy smoking, never make the throat dry or parched.

(11) Leighton Tobacco Co., 46 F.T.C. 1230 (1950). Prohibits claims that Phantom cigarettes cause no irritation, smoking quality remains uniform, never become stale.

(12) M. M. Importing Co., 30 F.T.C. 1533 (1940). Prohibits claims as to being importer, and as to alleged foreign origin of the cigarettes sold, unless true.

(13) Penn Tobacco Co., 34 F.T.C. 1636 (1942). Prohibits Julep cigarette claims that smoking said cigarettes is a remedy or treatment for coughs.

(14) Poulides Brothers, 31 F.T.C. 1645 (1940). Prohibits untrue claims that company has branches in foreign countries or that cigarettes manufactured in U.S. with imported tobaccos are manufactured in foreign countries.

(15) Riggio Tobacco Corp., 47 F.T.C. 1726 (1951). Prohibits claims that the oval shape of Regent cigarettes or their smaller cross-section burning area as compared with conventional round cigarettes causes Regents to smoke cooler than round cigarettes, that said cigarettes will provide any defense against throat irritation due to smoking; that their extra length will cause the smoke therefrom to be cooler than the smoke from standard length cigarettes; provided that nothing in said stipulation prohibits representations that during the time the extra length of such cigarette is being smoked the smoke therefrom will contain less irritating properties and will be cooler than the smoke from standard length cigarettes.

(16) Variety Sales Co., 24 F.T.C. 1547 (1937). Prohibits claims that by retailers using respondents lottery devices and premium merchandise cigarettes cost the consumer less than the regular price.

(17) A. Zophirio & Co., 30 F.T.C. 1504 (1940). Prohibits claims that respondent is a manufacturer or importer.

APPENDIX B

CIGARETTE ADVERTISING GUIDES

The following guides have been adopted by the Federal Trade Commission for the use of its staff in the evaluation of cigarette advertising.

No representation, claim, illustration, or combination thereof, should be made or used which directly or indirectly:

1. Refers to either the presence or absence of any physical effect or effects of cigarette smoking in general or the smoking of any brand of cigarette.

NOTE: Words, including those relating to filters or filtration, which imply the presence or absence of any physical effect or effects are considered subject to this guide.

2. Represents that any brand of cigarette or the smoke therefrom is low in nicotine or tars, or contains less nicotine, tars, acids, resins, or other substances, by virtue of its ingredients, method of manufacture, length, added filter, or for any other reason or without any assigned reason, than any other brand or brands of cigarettes when it has not been established by competent scientific proof applicable at the time of dissemination that the claim is true, and if true, that such difference or differences are significant.

NOTE: Words, including those relating to filtration, which imply lesser substances in the smoke, through filter comparisons or otherwise, are considered subject to this guide.

3. Refers to the effect or effects of cigarette smoking in general or the smoking of any brand of cigarette on the (a) nose, throat, larynx or other part of the respiratory tract, (b) digestive system, (c) nerves, (d) any other part of the body, or (e) energy.

4. Represents medical approval of cigarette smoking in general or the smoking of any brand of cigarette.

5. Compares the volume of sales of competitive brands of cigarettes, or the purchase or use of particular types, qualities or grades of tobacco in cigarettes, when such claim is not based on reliable information currently applicable when disseminated.

6. Relates to or contains testimonials respecting cigarette smoking or the smoking of any brand of cigarette unless (a) the testimonial is genuine, (b) the advertiser has good reason to believe it represents the current opinion of the author who currently smokes the brand named, and (c) it contains nothing violative of any of the other guides set forth herein.

7. Falsely or misleadingly disparages other cigarette manufacturers or their products.

NOTES:

(a) Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment.

(b) Nothing contained in these guides will have the effect of modifying the provisions of any existing cease and desist order or stipulation or altering the responsibility of any party thereto to fully comply with the specific provisions of such order or stipulation affecting it. They do not constitute a finding in and will not necessarily affect the disposition of any formal or informal matter now pending with the Commission.

(c) These guides will be altered, modified, or otherwise amended when and if the facts and circumstances warrant.

[F.R. Doc. 64-6565; Filed, July 1, 1964; 8:52 a.m.]

Title 7—AGRICULTURE

Chapter VII—Agricultural Stabilization and Conservation Service (Agricultural Adjustment), Department of Agriculture

[Amdt. 7]

PART 722—COTTON

Subpart—Acreage Allotment Regulations for the 1964 and Succeeding Crops of Upland Cotton

EXPORT MARKET ACREAGE

Correction

In F.R. Doc. 64-6133, appearing at page 7865 of the issue for Saturday, June 20, 1964, the following corrections are made:

1. In the first paragraph, "Agricultural Act of 1954" should read "Agricultural Act of 1964".

2. The last paragraph of § 722.228 should be designated as paragraph (j) instead of (1).

PART 728—WHEAT

Subpart—1965-66 Marketing Year

Correction

In F.R. Doc. 64-6253, appearing at page 7912 of the issue for Tuesday, June 23, 1964, the following corrections are made in § 728.101:

1. In the penultimate sentence of paragraph (b), the phrase "food grain base" should read "feed grain base".

2. In paragraph (l)(2), the phrase "repleting stored excess" should read "depleting stored excess".

Chapter IX—Agricultural Marketing Service (Marketing Agreements and Orders; Fruits, Vegetables, Tree Nuts), Department of Agriculture

[Bartlett Pear Reg. 1]

PART 917—FRESH BARTLETT PEARS, PLUMS, AND ELBERTA PEACHES GROWN IN CALIFORNIA

Grades and Sizes

§ 917.350 Bartlett Pear Regulation 1.

(a) *Findings.* (1) Pursuant to the marketing agreement, as amended, and Order No. 917, as amended (7 CFR Part 917), regulating the handling of fresh Bartlett pears, plums, and Elberta peaches grown in the State of California, effective under the applicable provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and upon the basis of the recommendations of the Bartlett Pear Commodity Committee, established under the aforesaid amended marketing agreement and order, and upon other available information, it is hereby found that the limitation of shipments of Bartlett pears, as hereinafter provided, will tend to effectuate the declared policy of the act.

(2) It is hereby further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in public rule making procedure, and postpone the effective date of this section until 30 days after publication thereof in the FEDERAL REGISTER (5 U.S.C. 1001-1011) in that, as hereinafter set forth, the time intervening between the date when information upon which this section is based became available and the time when this section must become effective in order to effectuate the declared policy of the act is insufficient; a reasonable time is permitted under the circumstances, for preparation for such effective time; and good cause exists for making the provisions hereof effective not later than July 3, 1964. A reasonable determination as to the supply of, and the demand for, Bartlett pears must await the development of the crop and adequate information thereon was not available to the Bartlett Pear Commodity Committee until June 23, 1964; recommendation as to the need for, and the extent of, regulation of shipments of such pears was made at the meeting of said committee on June 23, 1964, after consideration of all available information relative to the supply and demand conditions for such pears, at which time the recommendation and supporting information were submitted to the Department; shipments of the current crop of such pears are expected to begin on or about July 6, 1964; and this section should be applicable to all shipments of such pears in order to effectuate the declared policy of the act; and compliance with the provisions of this section will not require of handlers any preparation therefor which cannot be completed by the effective time hereof.

(b) *Order.* (1) During the period beginning at 12:01 a.m., P.s.t., July 3, 1964, and ending at 12:01 a.m., P.s.t., January 1, 1965, no shipper shall ship any box or container of Bartlett pears unless:

(i) All such pears grade not less than U.S. No. 2;

(ii) At least 85 percent, by count, of the pears contained in any box or container grade at least U.S. No. 1, with the following exceptions: (*a*) not to exceed 15 percent, by count, of such pears in any box or container may be damaged but not seriously damaged by hail or frost; and (*b*) such pears may fail to be fairly well formed only because of short shape but shall not be seriously misshapen; and

(iii) Such pears are of a size not smaller than the size known commercially as size 165: *Provided,* That a shipper may ship, during any day from any shipping point, pears which are smaller than the size known commercially as size 165 if (*a*) such smaller pears are not smaller than the size known commercially as size 180; and (*b*) the quantity of such smaller pears shipped from such shipping point does not, at the end of any day during the aforesaid period, exceed 5.26 percent of such shipper's total shipments of pears shipped from the same shipping point during such period, which are not smaller than the size known commercially as size 165.

(2) Section 917.143, as amended (7 CFR 917.100 et seq.), sets forth the requirements with respect to the inspection and certification of shipments of Bartlett pears. Such section also prescribes the conditions which must be met if any shipment is to be made without prior inspection and certification. Notwithstanding that shipments may be made without inspection and certification, each shipper shall comply with all grade and size regulations applicable to the respective shipment.

(c) *Definitions.* (1) Terms used in the amended marketing agreement and order shall, when used herein, have the same meaning as is given to the respective term in said amended marketing agreement and order.

(2) "Size 165" means Bartlett pears of a size which when packed in a standard pear box will pack, in accordance with the requirements prescribed for a standard pack, 165 pears in said box with the twenty-two smallest pears weighing not less than five and three-quarter pounds.

(3) "Size known commercially as size 180" means a size Bartlett pear that will pack a standard pear box, packed in accordance with the specifications of a standard pack, with five tiers, each tier having six rows with six pears in each row, and with the twenty-one smallest pears weighing not less than five pounds.

(4) "Standard pear box" means the container so designated in Section 828.3 of the Agricultural Code of California.

(5) "U.S. No. 1," "U.S. No. 2" "fairly well formed," "seriously misshapen," and "standard pack" shall have the same meaning as when used in the United States Standards for Pears (Summer and Fall), 7 CFR 51.1260-51.1280.

(Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674)

Dated: July 1, 1964.

PAUL A. NICHOLSON,
Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[F.R. Doc. 64-6698; Filed, July 1, 1964; 11:16 a.m.]

Title 29—LABOR

Chapter XIII—Bureau of Labor Standards, Department of Labor

PART 1500—CHILD LABOR REGULATIONS, ORDERS AND STATEMENTS OF INTERPRETATION

State Certificates of Age

The age, employment, or working certificates or permits of several States are designated in 29 CFR 1500.21 as having